(1) Supreme Court, U.S.
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In the Supreme Court of the United States

October Term 2001

Leon C. Baker P.C. and Leon C. Baker, individually,
Petitioners

v.

Merrill Lynch, Pierce, Fenner & Smith Inc.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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Date: February 4, 2002

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QUESTION PRESENTED

If a contract governed by the Federal Arbitration Act, 9 U.S.C. § 2 ("FAA"), provides that "all disputes arising hereunder shall be submitted to arbitration," should disputes about preclusion (res judicata and collateral estoppel) nevertheless be ruled on by judges, rather than by arbitrators?

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
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Petitioners, Leon C. Baker, P.C. ("P.C.") and Leon C. Baker ("Baker") pray that a Writ of Certiorari be issued to review the opinion and judgment of the Supreme Court of Alabama entered on August 31, 2001.

Opinions Below

The opinion of the Circuit Court of Jefferson County, Alabama, is not reported. A copy is set forth at page A-1of the Appendix.

The opinion of the Alabama Supreme Court is set forth at page C-1 of the Appendix. It is not yet reported in South 2d.

Jurisdiction

The opinion of the Alabama Supreme Court was entered on August 31, 2001. An application for rehearing was filed on September 13, 2001 and was denied on November 16, 2001. This Petition for a Writ of Certiorari was filed within ninety days of the denial. The Court's jurisdiction is invoked under 28 U. S.C. § 1257(a).

Constitutional and Statutory Provisions Involved

Article II, Section 3 of the United States Constitution provides in pertinent part:

> **The Congress shall have the Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *.**

Article IV, Section I of the United States Constitution provides in pertinent part:

> **Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.**

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law * * * .

The Federal Arbitration Act, Section 2, provides in pertinent part:

> A written provision in any maritime transaction or a contact evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, shall be valid, irrevocable, and enforceable * * *.

Corporate Disclosure Statement

Petitioner, Leon C. Baker P.C., is a New York professional corporation authorized to practice law in that state. The P. C.'s sole shareholder is Leon C. Baker. It has no subsidiaries.

STATEMENT OF THE CASE

A. Nature of the Case

The P.C. has a securities brokerage account with Respondent, Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") and signed the form of agreement Merrill Lynch requires its customers to execute. The

agreement provides that the parties will submit "all" disputes to arbitration. A dispute did arise, the details of which are set forth later in this Petition. The parties were unable to resolve the dispute by negotiation, and the P.C. sued Merrill Lynch in Florida, the state in which Baker, its sole shareholder, has been a resident and citizen since 1989.

Merrill Lynch moved to require arbitration. When reminded of the arbitration provision, the P.C. did not oppose Merrill Lynch's motion. The Florida court entered an agreed order directing arbitration and retained jurisdiction to enforce any award which might be entered.

The P.C. commenced an arbitration proceeding before the National Association of Securities Dealers, Inc. ("NASD"), the tribunal selected by Merrill Lynch pursuant to its arbitration agreement. Merrill Lynch filed an answer alleging res judicata as its principal defense. As is set forth more fully below, the P.C. maintains that res judicata is not applicable based both on the facts and on the law.

The NASD then submitted a list of prospective Florida arbitrators, from which a panel of three were to be appointed. The P.C. selected three lawyers from the NASD list. Merrill Lynch did not object to any of the P. C.'s nominees; nor did Merrill Lynch submit any alternative nominees. Accordingly, the arbitration panel would have consisted of three lawyers.

On the very eve of the hearing, without any notice to the P.C. or to the Florida court that had ordered arbitration, Merrill Lynch obtained from an *Alabama* trial court an ex parte restraining order prohibiting the P.C. and Baker from proceeding with the arbitration. [1]

B. The Rush to Judgment

The irreparable injury that Merrill Lynch alleged as the ground for equitable relief against the arbitration was that it asserted a defense of res judicata which, Merrill Lynch argued, non lawyer arbitrators would not understand (ignoring the fact that all the chosen arbitrators were lawyers). Baker and the P. C. objected that an Alabama court could not interfere with an arbitration ordered by a Florida court, and that Merrill Lynch had waived any right it might have had to object to arbitration, first, by seeking arbitration, and, second, by participating in it. Moreover, the P.C. showed that res judicata was not applicable because, as is more fully set forth below, the P.C. was not a party to the earlier proceedings and could not have appealed. Both the Alabama trial court and the Alabama Supreme Court

1. Merrill Lynch may have elected to sue in Alabama, rather than in Florida, among other reasons, because Alabama is notoriously hostile to arbitration. See Ala. Code 8-1-41, which invalidates agreements to arbitrate entered into before a claim has arisen.

rejected these objections and entered final judgment in favor of Merrill Lynch.

Although these were serious errors, the P.C. and Baker are not seeking certiorari with respect to them, paradoxically, because there is no conflict among the circuits (or state courts) a) that demanding and participating in arbitration waive any objections to arbitration, and b) that a non-appealable order can have no preclusion effect. Of course, if this Court grants certiorari on the grounds set forth in this Petition, the Court could reverse for those errors as well.

The Alabama trial court held that the P.C.'s claim was barred by res judicata and granted a permanent injunction. On appeal Merrill Lynch dropped its misrepresentation that the Florida arbitrators would be non-lawyers. Instead it argued that 1) despite the arbitration provision in Merrill Lynch's customers agreement requiring that *all* disputes be arbitrated, and 2) despite the FAA, actions in which the defendant avers a defense of preclusion (res judicata or collateral estoppel) must be submitted to courts rather than arbitrators. The Alabama Supreme Court affirmed a) the ruling of the trial court that the P.C. was barred by res judicata and b) the issuance of the permanent injunction.

C. The Facts

Neither the P.C. nor Merrill Lynch were parties to the original dispute and the lawsuits that ultimately gave rise to the arbitration and the present lawsuit. The prior litigation on which Merrill Lynch bases its preclusion defense was between Baker and J. R. Bennett and Laura Bennett, all residents of Florida. There were a total of four lawsuits in Alabama between Baker and the Bennetts, denominated in the Alabama Supreme Court 's opinion (Appendix C-2) as "Alabama-Baker I" through "Alabama-Baker IV."

Those four lawsuits arose out of a computer leasing transaction more than twenty years ago between persons completely unrelated either to the present litigation or to the lawsuits by the Bennetts against Baker in Alabama. Those persons were Gibbs and West, the owners of a coal mine in Alabama, and Atlantic Computer Leasing Ltd., an English computer lessor ("Atlantic"). Baker, then practicing law in New York, represented Atlantic.

In 1980 oil prices were very high as a result of the production restrictions of OPEC. This created a strong demand for coal, and Gibbs and West's Alabama mine became very profitable. They invested their profits and all the money they could borrow in digging shafts and tunnels and purchasing mining equipment. Near year

end, they realized they did not have, and could not borrow, enough funds to pay their income taxes.

Their Alabama accountants, who had worked with Baker on tax matters for other clients, telephoned him in New York and asked him to find a computer leasing "tax shelter" for Gibbs and West. Such "tax shelters" do not produce tax saving.They only defer taxes. Taxes "saved" during an initial five year accelerated depreciation period have to be paid during later years, when there are no depreciation deductions. What the investor receives from such a "tax shelter" is, in effect, an interest free "loan" from the United States Treasury. For Gibbs and West, though, this was exactly what they needed. They asked Baker to find them a computer leasing transaction. He did so with his client, Atlantic. Gibbs and West survived their cash crisis.

Six months later the accountants for Gibbs and West telephoned Baker to inform him that they had sold their mine and no longer needed tax deferral. The accountants added that they had another client, J. R. Bennett, who had a similar problem. Bennett's mobile home business was very profitable, but it was also expanding very rapidly, and he was short of cash. He wished to solve his problem by acquiring from Gibbs and West a half interest in their contracts with Atlantic. The accountants requested that Baker ask his client to

consent, which Atlantic did. Baker received no fee for his services.

Nine years later the Internal Revenue Service challenged the deductions J. R. Bennett and his wife had taken, and they paid approximately $850,000 of deferred taxes and interest. The taxes, of course, would have been payable later in any event. Moreover, the Bennetts received a tax deduction for the interest they paid. Thus their actual loss was small--particularly when compared with the value of saving Bennett's business. Nevertheless, the Bennetts sued Baker for $850, 000 plus punitive damages. The Alabama Supreme Court refers to that case as "Alabama-Baker I."

The Bennetts asserted two theories: First that Baker had acted as Bennett's attorney and had advised Bennett erroneously of the tax consequences of the transfer from Gibbs and West. The Huntsville, Alabama trial court directed a verdict dismissing this count. Second, the Bennetts alleged that Baker had committed intentional fraud in representing that a computer leasing transaction would provide a good tax shelter. Since the correctness of Baker's legal opinion was a matter of law for the court, Baker urged, based on Federal tax authorities, that the fraud count also should be dismissed. The court, however, simply left the tax issue for the jury to decide without any instructions on Federal tax law.

The jury returned a verdict, for compensatory damages of $440,000 but no punitive damages. The Alabama Supreme Court affirmed. It held that, although there was no evidence of intentional misrepresentation or failure to disclose facts, the jury could have found liability for innocent misrepresentation or innocent non-disclosure.

This was an unprecedented ruling since, both under prior Alabama law and general common law, there can be no damages for innocent misrepresentation or non-disclosure. The remedies are rescission or reformation, but neither of those remedies could have been obtained against Baker, because he was not a party to the original transaction between Gibbs and West and Atlantic Computer Leasing Ltd. or the subsequent assignment by Gibbs and West of a half interest to Bennett. Six years later, in *State Farm Fire & Cas. Co. v. Owen*, 729 So.2d 834 (Ala.1998), the Alabama Supreme Court overruled its decision against Baker in Alabama–Baker I. By then it was too late for Baker to reopen the case.

The action which the Alabama Supreme Court refers to as Alabama-Baker II arose out of the Bennetts' efforts to collect their judgment in Alabama even though Baker is not a resident of Alabama and has no assets there. The Bennetts served garnishments on the Alabama offices of a number of national securities firms. Baker never had an account with any of those Alabama offices, but the Bennetts contended that service on the Alabama offices required the

offices required the firms to deliver Baker's assets they held in offices outside Alabama.

The Huntsville court held that garnishment may not be used to reach a non-resident's assets by serving a resident bailee who holds the assets outside the state. The firms could be regarded as residents of Alabama, because of their local offices, but the assets of out-of-state customers held in other states could not be garnished in Alabama. With regard to the use of equity power, the court held that the Alabama Constitution, which prohibits imprisonment for debt, bars enforcement of money judgments by contempt proceedings.

In the lawsuit the Alabama Supreme Court refers to as "Alabama-Baker III," the Bennetts' lawyers successfully evaded the decision in Alabama-Baker II. They did so through the initial negligence of Merrill Lynch and its subsequent complicity.

The Bennetts' lawyers brought a new action in a different Alabama venue, in Birmingham. They served discovery notices on the major national securities brokerage firms, including Merrill Lynch, demanding copies of statements of any accounts Baker might have with them. Baker moved to dismiss on the ground of res judicata, but the court never ruled on his motion.

It was at this point, through the gross neglect of Merrill Lynch, that the P.C. was dragged into the

litigation. The P.C. had, and still has, a brokerage account with Merrill Lynch. When Merrill Lynch sent out monthly account statements, it abbreviated the name on the P.C.'s statements to "Leon C. Baker," omitting the corporate designation "P.C."

Over the years the P.C. had objected that its account name should be stated correctly, including "P.C." Merrill Lynch responded that the P.C. need not be concerned because the name was shown correctly on its internal account records. Nevertheless, the P. C. insisted that the statements be issued with the correct name. Merrill Lynch finally complied—but, unfortunately, not until after the disastrous events of Alabama-Baker III.

Merrill Lynch responded to the Bennetts' discovery request in the Birmingham action with a monthly statement of the P.C. but with "P.C." omitted! Based on this statement, the court directed Merrill Lynch to liquidate a Treasury bill in the P.C.'s account and to pay $723,353 to the Bennetts' attorneys.

Merrill Lynch responded by submitting an affidavit of its executive responsible for the P.C.'s account, who stated that the actual name on Merrill Lynch's records was "Leon C. Baker P.C." and that Merrill Lynch had made an error. Even so, the Birmingham court refused to

withdraw its order.[2]

At this point, only Merrill Lynch could appeal from the payment order. Baker could not, because his property had not been seized. The P.C. could not, because, under Alabama law, only parties can appeal. Merrill Lynch was a bailee that had made a mistake with respect to its bailor's property, which it was obligated to take legal action to protect. It could have intervened, appealed, and posted a bond rather than pay over the funds. Merrill Lynch chose not to do so.

Instead, Merrill Lynch sought to protect itself at the expense of its customer. It proposed that it would waive its objection and pay the $723,353 to the Bennetts if the court entered an order releasing Merrill Lynch from any liability to the P.C. for doing so. Counsel for the Bennetts prepared that order. Baker's assent was not required, because he claimed no interest in the account. The P.C. was not a party, and its consent was not sought. Nevertheless, Merrill Lynch contends that the order provides it with a preclusion defense on two points: 1) that Merrrill Lynch has no liability to the P. C. and 2) that the account belongs to Baker, not the P.C.

2. The Alabama Supreme Court, at page 3 of its opinion in the present case, noted that "the account had been opened in the name of Leon C. Baker P.C., ostensibly a corporate account of the P.C., rather than as an individual account of Baker"[emphasis by the court].

As an alternative basis for preclusion barring the Florida arbitration Merrlll Lynch relies on the "fact" that Alabama–Baker III was affirmed in Alabama-Baker IV. True there was an affirmance, but the appeal was solely by Baker on an unrelated issue. Since the P.C. was not a party to the action, under Alabama law it could not appeal even though its property had been seized. Consequently the order could not be, and was not, appealed or affirmed in Alabama-Baker IV and could not give rise to preclusion.

D. The Question Presented for Review By This Court Was Raised In The Alabama Courts

When Merrill Lynch sought an injunction in the Alabama trial court against the arbitration which was about to be tried in Florida, the P.C. and Baker filed a memorandum of law in opposition. The caption of a major point of the memorandum was the following:

> THE INJUNCTION MERRILL IS SEEKING IN THIS ACTION IS BARRED BY THE FEDERAL ARBITRATION STATUTE.

In support, the P.C. and Baker cited, among other authorities, this Court's holding in *Southland Corp. v. Keating*, 465 U.S. 1 (1984). They argued that Congress has declared a national policy favoring arbitration and has withdrawn the power of the states to require a judicial forum for the resolution of claims

which the contracting parties agreed to resolve by arbitration. The trial court, nevertheless, permanently enjoined the Florida arbitration.

In the Alabama Supreme Court, Baker and the P. C. argued: "The Federal Arbitration Act applies to arbitration agreements involving interstate commerce and preempts state law with respect to such agreements." That court, however, affirmed and denied reargument.

E. Reasons For Granting The Writ

There is a growing division of authority among the United States Courts of Appeals and among various state courts of last resort as to whether there should be a judicially created exception to Section 2 of the FAA for cases in which one party to an arbitration agreement asserts preclusion. The usual rationale advanced for creating such an exception is that preclusion law is recondite and beyond the ken of lay arbitrators.

Another, much narrower, rationale for reading in an exception to the federal statute for preclusion defenses was articulated by the Alabama Supreme Court (and by some United States Courts of Appeals). It is that the rendering court is better able to determine what was decided than arbitrators. However, the rendering court and the enforcing court are often entirely different tribunals. This defect in the theory is illustrated by this

very case. The judge who decided Alabama-Baker III was no longer on the court. The Alabama judge in the present case was just as uninformed about the earlier case as the Florida arbitrators would have been.

POINT I

BOTH FEDERAL AND STATE COURTS ARE SHARPLY DIVIDED AS TO WHETHER REQUIRING A JUDGE TO DECIDE PRECLUSION ISSUES IN A DISPUTE GOVERNED BY AN ARBITRATION AGREEMENT VIOLATES SECTION TWO OF THE FEDERAL ARBITRATION ACT.

The contract between the P.C. and Merrill Lynch, relates to interstate commerce because it covers sales and purchases on stock exchanges, through NASDAQ and in over-the-counter securities markets. In disputes under contracts which arise out of interstate commerce, the FAA requires federal and state courts to enforce arbitration provisions. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court said :

> In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of states to require a judicial forum for the resolution of claims the contracting parties agreed to resolve by arbitration.

Id. at 9.

The United States Courts of Appeals disagree as to whether, when parties have agreed to arbitrate all their disputes under a contract governed by the FAA, a defense of preclusion nevertheless should be decided by a judge. As shown below, early cases did not take the FAA into account in holding that judges, rather than arbitrators, should rule on a preclusion defense. More recent cases, but by no means all, hold that if the parties agreed to arbitrate *all* their disputes under the contract, the FAA requires that the arbitrators, not a judge, should rule on a preclusion defense. It is primarily because of this disagreement among the circuits that this Petition should be granted.

An early reported federal case was *Clements v. Central Railroad Co. of New Jersey*, 399 F.2d 825 (3d Cir.1968). Both the trial court and the Third Circuit assumed that the court was required to consider the preclusive effect of a prior judgment before compelling the parties to arbitrate. Another Third Circuit decision sometimes cited for the same proposition is *Telephone Workers of New Jersey v. New Jersey Bell Tel. Co.*, 584 F.2d 31 (3d Cir. 1978). However, that was not the issue on which the court decided that case. In fact, it did not even consider that issue. In *John Hancock Mutual Life Ins. Co. v. Olick*, 151 F.3d 132 (3d Cir. 1998), the Third Circuit had it both ways. It held that judges should rule on claims of preclusion based on prior judgments but that arbitrators should rule on claims of preclusion based upon prior awards.

In *Miller Brewing Co. v. Fort Worth Distributing*, 781 F.2d 494 (5th Cir. 1986), Miller and Fort Worth Distributing (referred to as "FWDC"in the court's opinion) entered into an agreement under which FWDC distributed Miller beer. The agreement provided that if Miller terminated the agreement without cause, an arbitration panel could order Miller to pay compensatory damages.

Miller did terminate and FWDC sued in a Texas state court. Miller removed to a federal district court but the Fifth Circuit remanded. FWDC took no steps to schedule arbitration until almost four years later, when its state court action was about to be dismissed for want of prosecution. Miller's attempt in a federal district court to enjoin the arbitration was denied. The Fifth Circuit reversed, holding that FWDC waived its right to arbitrate by taking depositions and by other activities before the state lawsuit was dismissed. In dictum, the Fifth Circuit added that the action also could have been dismissed on the ground of res judicata. Although FWDC had not sought damages in its state lawsuit (only an injunction), it could have. The court noted:

> **The doctrine of res judicata * * * and its cousin collateral estoppel have probably done more to prevent useless and wasteful litigation than arbitration ever could.**

Id. at 497 n.3.

That dictum and supposition are not much of a precedent for the proposition that only judges, and not arbitrators, should rule on res judicata and collateral estoppel. Nevertheless, they were followed by some Courts of Appeals. The first was *Kelly v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 985 F.2d 1067 (11th Cir. 1993). Kelly sued Merrill Lynch in a federal district court alleging violations of SEC Rule 10b-5. After the district court dismissed the complaint, Kelly began an arbitration on related state law claims.

The Eleventh Circuit affirmed an injunction against arbitration of the state law claims primarily on the authority of the *Miller Brewing* case but there was one important difference between the cases. In *Miller Brewing* the ground for enjoining the arbitration was that the defendant, FWDC, had waived arbitration by pursuing its failed lawsuit. The Eleventh Circuit ignored this holding and focused on the dictum that *Miller Brewing* might have been dismissed on the ground of res judicata. It declared:

> **Courts should not have to stand by while parties re-assert claims that have already been resolved.**

Id. at 1069. It cited as authority the Fifth Circuit's speculation that res judicata has "probably done more to prevent useless and wasteful litigation than arbitration ever could." Id. at 269.

In *Y & A Securities Litigation*, 38 F.3d 380 (8th Cir. 1994), the court considered the preclusion effect of a settled class action. In particular, the court explored whether claim preclusion applies either for or against class defendants who were not actual parties. The class action was brought in a United States district court in Missouri alleging "fraud on the market," which inflated the price of Y & A stock. The settlement was incorporated into a district court consent judgment.

Dean Witter Reynolds Inc., a securities brokerage firm, was not a defendant in the class action. Volk, a customer, and a member of the plaintiff class, commenced an arbitration against Dean Witter under its customers agreement. Volk alleged that he had incurred losses on Y & A stock because a Dean Witter broker forged his signature on a margin account agreement "well before the period covered by the class settlement." Dean Witter then obtained, on the ground of res judicata, a preliminary injunction from the federal district judge who had entered the consent judgment barring the arbitrators from proceeding. The Eighth Circuit affirmed.

The court's decision is cited as authority that a court, rather than arbitrators, should decide a res judicata issue. It is an authority, but it is not a strong one. Only a preliminary injunction was appealed. The Eighth Circuit did not have to, and did not, reach the merits. It only had to determine that the district court's

legal analysis was plausible and might be sustained on an appeal from a final order. The opinion declared:

> **Here the district court * * * has concluded that Dean Witter is likely to be able to prove that the class plaintiffs intended to release for free third party brokers like Dean Witter for bad acts which 1) Y & A had no responsibility for and could not possibly be indemnified for; and 2) affected individuals rather than the class. While at first blush this may appear to be a surprising outcome, we are not convinced the district clearly erred in so holding."**

Id. at 384. Chief Judge Arnold, concurring in the judgment, declared:

> **In general, when parties agree to submit a matter to arbitration, they contract for the arbitrator's decision on legal questions as well as on issues of fact. Such legal questions would include defenses, such as res judicata, and I do not read this Court's opinion today to hold generally that courts may by injunction, control the decision of arbitrators on questions of issue or claim preclusion.**

Id. at 384.

The Seventh Circuit, in a dictum, has speculated

"if the party opposing arbitration on grounds of collateral estoppel asks the court to enjoin arbitration before there is any award, * * * the court will have to decide whether to refuse or order arbitration * * *." ***Miller v. Runyon,*** **77 F.3d 189, 194 (7th Cir.1996).**

There is no ambiguity in the contrary holding of the Second Circuit in *National Union Fire Ins. Co. of Pittsburgh Pa. v. Belco Petroleum Corp.*, 88 F.3d 129 (2nd Cir. 1996), that Section 2 means exactly what it provides. In brief the statute does not permit issues to be decided by courts which the parties have agreed to submit to arbitration.

The case arose out of the seizure of Belco's oil fields and equipment by the Peruvian government. The dispute was between Belco and a group of insurance companies which had issued policies insuring Belco against expropriation. The insurers sought to rescind the policies alleging that Belco had made misrepresentations. The policies provided that all disputes arising under them should be arbitrated, and the arbitrators awarded Belco approximately $145 million plus interest.

Belco later recovered $3 million from a different insurer for vessels taken by the Peruvian government. The insurers who had paid the earlier award demanded a portion under a provision in their policies that proceeds collected from other insurance should be shared between them and Belco. When Belco disputed

this claim, the insurers initiated a second arbitration. Belco sought a declaratory judgment that the claim was barred by res judicata, and the insurers countered with a petition to compel arbitration. The district court ruled that under federal law the arbitrators had to decide the preclusion issue. The Second Circuit affirmed, reasoning:

> **Belco's claim of preclusion is a legal defense to National Union's claim. As such it is itself a component of the dispute on the merits. Belco's attempt to characterize the preclusion issue as not related to the merits is unavailing. It as much related to the merits as a time limit in the arbitration agreement or laches. * * ***
>
> **The [arbitration] provision covers "all disputes which may arise under *or in connection with this policy*"[emphasis added by the court], and is not limited, as Belco contends, to disputes that require interpretation of the AIG policy. We do not believe the arbitration provision is ambiguous, but even if it were, the FAA would require resolving any ambiguity in favor of arbitration.**

Id. at 135.

The Alabama Supreme Court (at Appendix C-10) sought to limit *Belco* by declaring that it held only "that the preclusive effect of a prior arbitration

proceeding on claims asserted in a subsequent arbitration proceeding is arbitrable." Four months after *Belco*, however, the Second Circuit elaborated its position on the preclusive effect of a prior judgment in *National Fire Ins. Co. v. National Gypsum Co.*, 101 F. 3d 813 (2d Cir. 1996). The district judge granted an injunction against arbitration of a claim he held was precluded by his affirmed decision in a prior case. In reversing, the Second Circuit said:

> **Our decision is consistent with our recent holding that the issue-preclusion effect of a prior arbitration is arbitrable and must be arbitrated. *Belco*, 88 F.3d at 135-36. In *Belco* we rejected the argument that issue preclusion is not related to the merits of an agreement and nonarbitrable, noting that "Belco's claim of preclusion is a legal defense to National Union's claim. As such it is a component of the dispute on the merits." *Belco*, 88 F.3d at 135. Although the present dispute involves the preclusive effect of a prior judgment, Wellington's arbitration agreement covers "any disputed issues " within [its] scope. Thus a defense based on the issue preclusive effect of a prior judgment is part of the dispute on the merits**

Id. at 817. The Alabama Supreme Court's narrow interpretation of *Belco* is obviously erroneous.

In *Chiron Corp. v. Ortho Diagnostic Systems*,

Inc., 207 F.3d 1126 (9th Cir. 2000), the district court confirmed an arbitration award. The Ninth Circuit aligned itself with the Second Circuit, declaring:

> Like the agreement in *Belco*, Chiron and Ortho's arbitration agreement is undeniably broad. Ortho's res judicata defense to a subsequent arbitration proceeding necessarily involves an inquiry into Chiron's underlying claims. As with respect to other affirmative defenses, such as laches and the statute of limitations, we agree with the Second Circuit that a res judicata defense is a "component" of the merits of the dispute and is thus an arbitrable issue.

Id. at 1134.

The manifest split in the United States Courts of Appeals demonstrated above exists as well among state courts. The division is not only in cases in which the state courts are applying their domestic laws, but also when the FAA requires them to apply federal law.

The Alabama Supreme Court in this case, for example, cited *Rembrandt Indus. Inc. v. Hodges International, Inc.*, 38 N.Y. 2d 502, 381 N.Y.S.2d 451, 344 N. E. 2d 383 (1976). (App. C.13) The arbitration defendant brought suit on a counterclaim, alleging that the arbitrators had refused to consider it. The plaintiff responded that the arbitrators had rejected the counterclaim and that it was barred by res judicata. A

divided New York Court of Appeals held that the lower court had not abused its discretion in permitting res judicata to be pleaded as a defense. Neither party demanded arbitration so the issue was one for the court. By contrast, when the parties have agreed to arbitrate all their disputes, as in this case, the same court held that arbitrators are to determine preclusion issues. *Board of Education v. Patchogue- Medford Congress of Teachers*, 48 N.Y. 2d 812, 424 N.Y.S.2d 122, 399 N.E.2d 1143 (1979).

A Virginia case cited by the Alabama Supreme Court, *Waterfront Construction, Inc. v. North End 49ers*, 51 Va. 417, 468 S.E.2d 894 (1996)(*en banc*), discusses the role of courts and arbitrators with respect to preclusion issues. It held that a court rather than arbitrators should rule on the res judicata effect of an arbitration when the parties had not agreed to arbitrate that issue.

Given the major conflict of authority among the United States Courts of Appeals and the highest courts of some states as to whether preclusion defenses are to be ruled on by arbitrators or solely by courts, this Petition for Certiorari should be granted. Only this Court can provide a much needed uniform construction of the FAA on this important and recurrent issue.

POINT II

WHETHER COURTS MAY CREATE EXCEPTIONS UNDER THE FEDERAL ARBITRATION ACT FOR PRECLUSION ISSUES WHEN THE PARTIES HAVE CONTRACTED TO SUBMIT "ALL" DISPUTES TO ARBITRATION CALLS INTO QUESTION IMPORTANT FEDERAL POLICIES AND THE DIVISION AMONG THE FEDERAL AND STATE COURTS ON THIS POINT IS WORTHY OF THIS COURT'S ATTENTION.

The present case is a perfect vehicle for this Court to resolve the manifest conflict among the federal Courts of Appeals and state courts, because the question is squarely presented without diversionary side issues. The Merrill Lynch customers agreement provides that "all" disputes under it shall be submitted to arbitration. It indisputably relates to interstate commerce. Nor are there any factual disputes which detract from the clarity of the legal issues.

The issue in this case is important and "ripe" for determination. As this Court has noted, courts have not suffered arbitration gladly. *Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198, 211 (1958). The history of arbitration in this Court is the abrogation, step by step, of the reluctance of lower courts to accept arbitration as a substitute for litigation. *In Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), this Court summarized the history as follows:

First, the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate . * * * The origins of those refusals apparently lie in "ancient times," when the English courts fought for "extension of jurisdiction----all of them being opposed to anything which would deprive every one of them of jurisdiction * * *." American courts initially followed the English practice, perhaps just "stand[ing] . . . upon the antiquity of the rule"prohibiting arbitration clause enforcement rather than "upon its excellence or reason"* * *. Regardless, when Congress passed the Arbitration Act in 1925, it was "motivated, first and foremost, by a * * * desire" to change this antiarbitration rule* * *. It intended courts to "enforce [arbitration] agreements into which parties entered * * * upon the same footing as other contracts * * * ."

Id. at 270.

This Court has rejected contentions 1) that the FAA applies only in federal question cases, *Prima Paint Corp. v. Flood & Conklin, Mfg. Co.*, 388 U.S. 395 (1967), 2) that the FAA does not preempt conflicting state (Alabama) anti-arbitration law, *Allied Bruce Terminix Co., supra*, and 3)

that the FAA does not supersede state law prohibiting arbitrators from awarding punitive damages. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

Although the P.C. argued in the Alabama courts that the FAA requires them to give effect to the agreement of the parties that "all "their disputes should be resolved through arbitration, there is no mention of the FAA in either the ruling of the Alabama trial court or the decision of the Alabama Supreme Court.

Judges who have taken it upon themselves to rule on preclusion issues, despite agreements of the parties that all disputes be resolved by arbitration, in effect have viewed themselves as quasi parties to the controversy. The judges feel free to override the agreement of the parties on the theory that a) the judges have an independent interest in their prior rulings and b) they have not agreed to submit *their* contentions to arbitration. That is a fundamental error which this Court should correct.

Section 2 of the FAA and the decisions of this Court establish the importance of arbitration, and seek to overcome the reluctance of courts to enforce arbitration contracts. Only this Court can determine the propriety, or impropriety, of courts extracting issues--such as preclusion but potentially other matters as well--from arbitration, either because they are deemed too complex or for some other reason.

The issue presented by this Petition is critical to the arbitration process and currently is the subject of highly divergent judicial decisions both on the federal and state levels. A uniform principle needs to be be established, because the scope of arbitration under the FAA should not depend on the fortuity of the Circuit or state court in which the dispute arises or be subject to forum shopping of counsel seeking to halt arbitration. Moreover, the declaration of a uniform principle would eliminate the unseemly business of a court in one state (Alabama) enjoining an arbitration ordered by a court of another state (Florida) as occurred in this case.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,
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(2) Supreme Court, U.S.
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In the Supreme Court of the United States

October Term 2001

Leon C. Baker P.C. and Leon C. Baker, individually,
Petitioners

v.

Merrill Lynch, Pierce, Fenner & Smith Inc.,
Respondent

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ALABAMA

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Date: February 4, 2002

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D. Order of the Supreme Court of Alabama overruling application for rehearing D-1

IN THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,	)
Plaintiff,	)
v.	) **Civil Action No. CV-00-2000**
LEON C. BAKER, P.C. and LEON C. BAKER individually	)

ORDER

This matter has come before the Court on the Verified Complaint filed by Plaintiff Merrill Lynch, Pierce, Fenner, & Smith Inc. This Court has conducted a full evidentiary hearing, and it has given due consideration to the issues presented. It hereby holds that both Defendants are collaterally estopped from arguing that Plaintiff is legally liable for the court-ordered withdrawal of over $700,000 from Merrill Lynch Account Number 754-96534 ("Account 754-96534").

In particular, the Court finds that, for the following reasons, Plaintiff has satisfied the requirements for the issuance of a permanent injunction:

1. This Court finds that it has personal jurisdiction over Defendant Leon C. Baker ("Mr. Baker"). Prior courts, including this Court in J.R. Bennett et al. v. Leon C. Baker et al., CV 94-5629 ("CV 94-5629"), have held that Alabama courts have jurisdiction over Mr. Baker. Certainly this Court has personal jurisdiction over Mr. Baker in this case, which is a related and ancillary action that seeks to enforce this Court's rulings in CV 94-5629. Independent of these prior rulings, this Court finds that Mr. Baker has had sufficient contacts with the State of Alabama to satisfy the requirements of personal jurisdiction in this action.

2. This Court also finds that it has personal jurisdiction over Leon C. Baker, P.C. ("the P.C."). Assuming for present purposes that the P.C. is a separate and bona tide

entity, the P.C. has had sufficient contacts with the State of Alabama to satisfy the requirements of personal jurisdiction. For example, the P.C. recently pursued and litigated claims in federal court here in Birmingham before Judge U.W. Clernon.

3. Thus, this Court is empowered to decide the preclusive effect of CV 94-5629 on the Defendants.

4. In CV 94-5629, this Court, acting through Judge Roger Monroe, entered several orders requiring Plaintiff to transfer funds out of Account 754-96534.

5. Although Defendants deny it, Judge Monroe made at least two findings in CV 94-5629 in connection with his orders requiring the transfer oft said funds from Account 754-96534. These two findings were made after Judge Monroe had given Mr. Baker several opportunities to present evidence against said findings.

6. First, Judge Monroe specifically found in CV 94-5629 that Account 754-96534 was a personal account of Mr.

Baker's, not a P.C. account. See CV 94-5629 October 25, 1994 Order, p. 4 ("The Court specifically finds as a matter of fact that Baker's Merrill Lynch Account #754-96534 . . . is a personal account of Baker's.").

7. Second, Judge Monroe specifically found that Merrill Lynch was to be held harmless for the transfer of funds from Account 754-96534. See CV 94-5629 October 27, 1994 Order ("Merrill Lynch is not liable to Leon C. Baker or Leon C. Baker, P.C. as a result of Merrill Lynch's transfer and liquidation of securities as directed by this Court.").

8. These two findings ("the Findings"), which were actually litigated and which were necessary to Judge Monroe's judgment, satisfy the requirements of collateral estoppel as between Plaintiff and Mr. Baker. Accordingly, Mr. Baker is collaterally estopped from relitigating the Findings with Merrill Lynch or those in privity with Merrill Lynch.

9. The Findings also satisfy the requirements of

collateral estoppel as between Plaintiff and the P.C. The primary reason that this is true is that, under New York law or Alabama law, the P.C. is the alter ego of Mr. Baker, with no bona tide, independent legal existence. Accordingly, its corporate veil should be and hereby is pierced.

10. The Court's alter-ego finding is based on clear and compelling evidence. Some illustrative examples of this evidence follow: Mr. Baker has been the P.C.'s only president and is the only person with a financial interest in the P.C.; the P.C. has had no employees since 1987; for years, the P.C. has not actively engaged in the practice of law (in fact, for years it has done nothing on a daily basis); it has held no meetings; it has kept no corporate minutes; it has paid no salaries; its funds have been used for Mr. Baker's personal purposes; it has been otherwise misused for improper purposes; and Mr. Baker himself gave testimony suggesting that he and his P.C. were one and the same.

11. Even assuming, for the sake of argument, that the P.C. is bona fide, there are several reasons why it is bound by the Findings in CV 94-5629. This Court holds that: (1) the P.C. is and has always been closely-held by Mr. Baker, which under the law is enough for it to be bound to the Findings; (2) the P.C. substantially participated in the control of Mr. Baker's defense of CV 94-5629; (3) Mr. Baker adequately represented the P.C. 's interests when defending CV 94-5629; and finally, (4) the P.C. could have intervened in CV 94-5629 but deliberately chose not to do so. Accordingly, the P.C. is collaterally estopped from relitigating the CV 94-5629 Findings with Merrill Lynch or those in privity with Merrill Lynch.

12. The P.C. has filed an arbitration claim against Plaintiff with the National Association of Securities Dealers ("NASD"), which is styled Leon C. Baker. P.C. v. Merrill Lynch, Pierce, Fenner & Smith Inc., NASD Case No.99-03764.

Said arbitration seeks to relitigate the Findings described above.

13. This Court has reviewed the law cited by the parties hereto, and it holds that it has the power to enjoin an arbitration that seeks to relitigate already-decided issues. Thus, because the P.C.'s NASD arbitration (referenced above) seeks to relitigate identical issues that were actually litigated and necessary to the judgment in CV 94-5629, and because the P.C. is bound by the Findings in CV 94-5629, this Court will permanently enjoin the PC. from pursuing said arbitration.

14. It is unnecessary for this Court to enjoin Defendants from filing litigation in another court. A permanent injunction against any arbitration will suffice, since an arbitration forum is the only forum in which Defendants could have brought claims against Merrill Lynch (absent this Court's injunction, of course). Indeed, Defendants have represented to this Court that their only recourse against

Merrill Lynch is through an arbitration. Defendants' Memorandum of Law in Support of Cross Motion to Dismiss the Complaint, p. 4 ("If this Court were now to enjoin the pending arbitration by the NASD, as Merrill Lynch demands, the claim against. Merrill Lynch could not be asserted anywhere else."). In any event, if Defendants were to go back on this commitment and file a case in another court, Plaintiff could – and should – use the preclusive force of the instant Order to have said case dismissed with prejudice. Plaintiff would also have a claim for abuse of process or malicious prosecution, were such a case to be filed.

15. However, out of an abundance of caution, this Court will enjoin Defendants from giving testimony or from causing others to give testimony that relates in any way to the Findings described above, including testimony that is used in an attempt to hold Merrill Lynch liable for the withdrawal of the funds from Account 754-96534. If Defendants violate this

aspect (or any other aspect) of this Court's injunction, they can be held accountable for contempt.

16. This Court has considered all of the arguments that Defendants have raised in opposition to Plaintiff's request for a permanent injunction, including the arguments raised in Defendants' Memorandum of Law in Support of Cross Motion to Dismiss the Complaint (as well as the arguments raised in Defendants' underlying motion). All such arguments are hereby rejected as meritless.

Accordingly, this Court hereby ORDERS, ADJUDGES, and DECREES as follows:

(1) Defendant Leon C. Baker, P.C. shall be and hereby is PERMANENTLY ENJOINED, directly and indirectly, whether alone or in concert with others, from prosecuting or maintaining its current National Association of Securities Dealers arbitration case against Plaintiff, which is styled Leon C. Baker P.C. v. Merrill Lynch, Pierce, Fenner, & Smith Inc.,

NASD Case No.99-03764. Instead, said arbitration case is to be dismissed; and

(2) Both Defendants (Leon C. Baker, P.C. and Leon C. Baker individually) shall be and hereby are PERMANENTLY ENJOINED from filing, bringing, maintaining, or facilitating (either directly or indirectly, and whether alone or in concert with others) any arbitration case that seeks to hold Plaintiff (or its employees, agents, or representatives, including its attorneys) liable or responsible for (1) the actions of this Court in J.R. Bennett et al. v. Legn C. Baker et al., CV 94-5629 or (2) the withdrawal(s) that this Court ordered from Merrill Lynch Account Number 754-96534; and

(3) Both Defendants (Leon C. Baker, P.C. and Leon C. Baker individually) shall be and hereby are PERMANENTLY ENJOINED from filing or prosecuting any arbitration claim that challenges the two Findings of this Court in CV 94-5629, as defined above; and

(4) Both Defendants (Leon C. Baker, P.C. and Leon C.

Baker individually) shall be and hereby are PERMANENTLY ENJOINED from giving testimony or from causing others to give testimony that relates in any way to the Findings described above, including testimony that is used in an attempt to hold Merrill Lynch liable for the withdrawal of the funds from Account 754-96534. This prohibition specifically includes giving testimony by affidavit or otherwise.

The Court further holds that all of Defendants' pending motions are DENIED.

Each party shall bear its own costs.

This final judgment is dated the 23 day of May, 2000.

/s/ Judge N. Daniel Rogers, Jr.
JUDGE N. DANIEL ROGERS, JR.
CIRCUIT COURT JUDGE

APPENDIX B

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,	)	CIRCUIT COURT
Plaintiff,	)	TENTH JUDICIAL CIRCUIT
v.	)	OF ALABAMA
LEON C. BAKER, P.C. and LEON C. BAKER individually	)	CIVIL ACTION NO. CV-00-2000

ORDER

This case came before the Court this date on the following matters:

(1) Motion for a New Trial With Respect to Permanent Injunction and for Alteration or Amendment of Order and Judgment, filed by Leon C. Baker and Leon C. Baker, P.C. on June 13, 2000; and

(2) Plaintiff's Response in Opposition to Defendants' "Motion for a New Trial With Respect to Permanent Injunction and for Alteration or Amendment of Order and Judgment," filed on June 22, 2000.

The Court notes that in the Motion filed by said Lean C. Baker and Leon C. Baker, P .C., oral argument is not requested..

After consideration of the defendants' said Motion and the response by the plaintiff, the said Motion for a New Trial With Respect to Permanent Injunction and for Alteration or Amendment of Order and Judgment, filed by Leon C. Baker and Leon C. Baker, P.C., is overruled and denied.

DONE AND ORDERED, this 28th day of June, 2000.

/s/ N. Daniel Rogers, Jr.
N. Daniel Rogers, Jr.
Circuit Judge

cc: Mr. Carl S. Burkhalter
Mr. R. Allen Kilgore, Jr
Mr. James R. Sturdivant

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2001

1992139

Leon C. Baker, P.C., and Leon C. Baker

v.

Merrill Lynch, Pierce, Fenner & Smith, Inc.

Appeal from Jefferson Circuit Court
(CV-00-2000)

WOODALL, Justice.

Leon C. Baker, a Florida resident, is the owner and sole shareholder of Leon C. Baker, P.C. ("the PC"), which is incorporated under the laws of New York for the purpose of engaging in the practice of law in that state. Baker and the PC appeal from an order permanently enjoining them from arbitrating a dispute with Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), before the National Association of Securities

Dealers, Inc. (the "NASD") We affirm. Because the appeal involves the applicability of the doctrine of collateral estoppel, we must place this case within the context of the earlier related litigation.

This is the fifth time Baker has been before this Court in matters relating to the underlying dispute. See Baker v. Bennett, 603 So. 2d 928 (Ala. 1992), cert. denied, 507 U.S. 912 (1993), overruled, State Farm Fire & Cas. Co. v. Owen, 729 So. 2d 834(1998) ("Alabama-Baker I"); Baker v. Bennett, 644 So. 2d 901 (Ala. 1994) ("Alabama-Baker II"); Baker v. Bennett, 660 So. 2d 980 (Ala. 1995) ("Alabama-Baker III") and Baker v. Bennett (No. 1940172) , 667 So. 2d 743 (Ala. 1995) (table) (affirming without an opinion circuit court case no. CV-94-05629 on May 26, 1995) ("Alabama-Baker IV").

The substantive facts underlying this litigation are fully set forth in Alabama-Baker I and Alabama-Baker III. The dispute with

Merrill Lynch is part of the appellants' long-running attempt to avoid the consequences of a $440,025 judgment against Baker in favor of J.R. Bennett and Laura Bennett affirmed in Alabama-Baker I. Merrill Lynch's direct involvement in the dispute between Baker and the Bennetts began on August 8, 1994, when the Bennetts filed in the Jefferson Circuit Court an "Application for Temporary Restraining Order and Preliminary Injunction and Complaint for Specific Performance and for Discovery of Property" (cir. case no. CV-94-05629) The defendants named in that complaint included Baker and Merrill Lynch. The complaint alleged that "Baker own[ed] securities held by [Merrill Lynch] with fair market values sufficient to satisfy the Bennetts' judgment against Baker." It sought an order enjoining Baker from "concealing, transferring or otherwise attempting to insulate the securities from attachment for his debt," and enjoining Merrill Lynch from "transferring any securities of Baker."

As a consequence of that action, Merrill Lynch revealed the existence of brokerage account number 754-96534, which had been opened in the name of "Leon C. Baker, P.C.," ostensibly a corporate account of the PC, rather than as an individual account of Baker.[1] In compliance with a specific order of the trial court, Merrill Lynch opened an account in the name of the Bennetts' attorneys and transferred assets valued at $724,353.33 from account number 754-96534 to that account. That amount

---

[1] Account number 754-96534 was opened in 1990. The agreement opening the account contained an arbitration clause; that clause provides in pertinent part:

> "I agree that all controversies which may arise between us, including but not limited to those involving any transaction or the construction, performance, or breach of this or any other agreement between us, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration. Any arbitration under this agreement shall be conducted only before the New York Stock Exchange, Inc., the American Stock Exchange, Inc., or [an] arbitration facility provided by any other exchange, the National Association of Securities Dealers, Inc., or the Municipal Securities Rulemaking Board."

represented the amount of the Bennetts' judgment against Baker, plus accrued interest on that amount, plus $90,000 that had been assessed against Baker for civil contempt. The trial court ordered the transfer, because, it concluded, account number 754-96534 was, in reality, "a personal account of Baker's." Specifically, in an order dated October 25, 1994, the trial court stated:

> "Baker has asserted, in a letter to this court and in an affidavit, that such account is a 'P.C.' account. Baker contends that the securities made subject to this court's orders are actually owned by Leon C. Baker, P.C., a New York corporation, and not by Baker individually. However, there is absolutely no evidence in the record in this case that the account in question is anything other than a personal account. Baker has not been willing to appear and testify about this account and subject himself to cross-examination even though the court ordered him to be present. . . .The only competent and admissible evidence before this court is the brokerage statement from such securities account which shows unequivocally that the account is titled in the name of Leon C. Baker, not Leon C. Baker, P.C. Such brokerage statement was produced by defendant Merrill Lynch and was offered into evidence by the plaintiffs and admitted without objection by any defendant. Moreover, the address on such account is Baker's residence address in Boca

> Raton, Florida, not New York. . . . Baker has now had three full and fair opportunities to present any competent and admissible evidence to contradict his personal ownership of such account, but he has failed to do so. Accordingly, this court's factual finding that Merrill Lynch Account [754-96534] is a personal account of Baker's is specifically reaffirmed."

Additionally, the trial court held that Merrill Lynch was "not liable to Leon C. Baker or Leon C. Baker, P.C. as a result of Merrill Lynch's transfer and liquidation of securities." The circuit court's judgment in case no. CV-94-05629 (Alabama-Baker IV) became final on January 13, 1995.

While some of these cases were pending in Alabama, Baker was litigating the same and related issues in Florida. See Baker v. Bennett, 633 So. 2d 91 (Fla. Dist. Ct. App.), review denied, 641 So. 2d 1344 (Fla.), cert. denied, 513 U.S. 1018 (1994) ("Florida-Baker I"). Indeed, immediately after the Jefferson Circuit Court ordered the transfer of assets from account number 754-96534, the PC commenced an action styled Baker v. Merrill Lynch, Pierce,

Fenner & Smith, Inc., [Ms. 94-8318-AO] (15th Jud. Cir. Fla. 1995) ("Florida-Baker II"). In that case, the PC alleged that Merrill Lynch had negligently allowed the Bennetts to discover the existence of account number 754-96534 and that that negligence had caused damage to the PC in the amount that the Jefferson Circuit Court had ordered transferred to the account set up in the name of the Bennetts' attorneys. The PC sought an order enjoining Merrill Lynch from transferring the assets, as it had been ordered to do by the Alabama trial court. It also sought compensatory damages.

On November 14, 1994, before a final judgment was entered in Alabama-Baker IV, Merrill Lynch moved the court in Florida-Baker II to compel arbitration. On December 20, 1994, the trial court granted that motion. Consequently, it stayed the judicial proceedings in Florida "until the resolution of the arbitration . . . [and] retain[ed] jurisdiction to confirm the arbitration award." On

June 21, 1995, however, the court dismissed the action in Florida-Baker II, with prejudice.

Shortly after the dismissal of Baker's claims in Florida-Baker II, the PC commenced an action in the United States District Court for the Southern District of New York against the Bennetts and the Bennetts' lawyers, alleging abuse of process. That case was transferred to the United States District Court for the Northern District of Alabama. Leon C. Baker, P.C. v. Bennett, 942 F. Supp. 171 (S.D.N.Y. 1996). That court dismissed the PC's complaint.

In August 1999, the PC filed a complaint in arbitration against Merrill Lynch before the NASD. It sought compensation on theories of negligence and breach of fiduciary duty, arising out of Merrill Lynch's disclosure of the existence of account number 754-96534. More specifically, it alleged:

> "[T]he Bennetts' lawyers served discovery requests on the various brokerage firms including Merrill Lynch to determine whether they were in possession of any securities owned by Mr. Baker. When responding . . . , Merrill Lynch should have answered either (1) 'No' or (2) 'Only securities of Leon C. Baker and Gloria Baker as tenants by the entirety.' There the matter would have ended, because the Bakers are residents of Florida and under Florida law tenancy by the entirety property cannot be seized to satisfy an obligation of only one of the spouses.
>
> "Instead Merrill Lynch delivered an account statement of the Corporation, Leon C. Baker, P.C., but with the P.C. omitted. On its face, therefore, the account appeared to belong to Mr. Baker. Based on this evidence, the Bennetts' lawyers convinced [the circuit judge] that this account was Mr. Baker's personal account, and [he] ordered Merrill Lynch [to] liquidate the account and pay Bennetts' attorneys $72[4], 453."

The complaint sought recovery of the $724,353, plus interest on that amount, and $500,000 in expenses.

On April 3, 2000, Merrill Lynch filed in the Jefferson Circuit Court a "Verified Complaint for Injunctive Relief seeking to enjoin the "arbitration case brought by the PC . . . pending

before the [NASD]." As the basis for injunctive relief, Merrill Lynch asserted the defense of collateral estoppel. It argued that the claims the PC made in the arbitration complaint were based on two issues that had been decided adversely to Baker in Alabama-Baker IV. Specifically, it alleged that the PC was estopped to assert (1) that account number 754-96534 was not Baker's individual account, and (2) that Merrill Lynch was liable to Baker or to the PC for liquidating the assets in the account pursuant to the order of the Jefferson Circuit Court. Baker and the PC moved to dismiss the complaint.

On May 23, 2000, the trial court denied the motion to dismiss the complaint, and entered an order permanently enjoining arbitration of the dispute. It held that both Baker and the PC were bound by the findings in Alabama-Baker IV, namely, that account number 754-96534 was Baker's individual account and that Merrill Lynch was not liable to Baker or the PC for liquidating the assets in the account. In other words, it held that the arbitration of the

claims of Baker and the PC is barred by the doctrine of collateral estoppel. Subsequently, it denied Baker and the PC's motion to alter or amend its order, and Baker and the PC appealed.

Baker and the PC challenge the injunction on a number of grounds. They contend the trial court erred in holding that collateral estoppel barred the arbitration of claims against Merrill Lynch arising from its disclosure of account number 754-96534. Also, they contend that Merrill Lynch waived the right to object to arbitration.

I. Application of the Doctrine of Collateral Estoppel

A. Who Decides?

As a threshold matter, Baker and the PC contend that the question of the applicability of the doctrine of collateral estoppel is, itself, arbitrable. In other words, they contend that the trial court erred even in considering whether the doctrine of collateral estoppel was applicable. This determination, they insist, must be

made by the arbitrators.

In Alabama, the doctrine of collateral estoppel will bar the relitigation of a previously resolved issue where (1) the issue and the parties in the second case are the same as the issue and the parties in the first case; (2) the issue was "actually litigated in prior action"; and (3) the "resolution of the issue was necessary to the prior judgment." v Wheeler v. First Alabama Bank of Birmingham, 364 So. 2d. 1190, 1199 (Ala. 1978). The question of who decides whether the arbitration of a previously litigated issue is collaterally estopped appears to be a matter of first impression in this Court.

The issue has been addressed in other jurisdictions, and those courts have reached divergent conclusions. For example, some courts have held that the preclusive effect of a prior judicial determination is to be decided by a court, rather than an arbitrator: John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 139 (3d Cir. 1998) (preclusive effect of prior judgments is a matter to be resolved by courts, not arbitrators). In re Y & A Group Sec. Litigation, 38 F.3d 380,

383 (8th Cir. 1994) ("The district court, and not the arbitration panel, is the best interpreter of its own judgment."); Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 985 F.2d 1067 (11th Cir.), cert. denied, 510 U.S. 1011 (1993); C & 0 Dev. Co. v. American Arbitration Ass'n, 48 N.C. App. 548, 552, 269 S.E.2d 685, 687 (1980) ("the extent of a judgment's binding effect is a matter for judicial determination").

Some cases hold that the preclusive effect of a prior arbitration proceeding on claims asserted in a subsequent arbitration proceeding is to be decided by the court. Waterfront Marine Constr., Inc. v. North End 49ers Sand.bridge Bulkhead Grouns A. B & C, 251 Va. 417, 432, 468 S.E.2d 894, 903 (1996) ("the court, not the arbitration panel, determines whether a previous arbittation award operates as res judicata or collateral estoppel on a subsequent action or demand for arbitration"); Monmouth Pub. Sch.. Dist. No. 38 v. Pullen, 141 Ill. App. 3d 60, 489 N.E.2d 1100, 1105, 95 Ill. Div. 372 (1985); Rembrandt Indus., Inc. v. Hodges Int'l, Inc., 38 N.Y.2d 502, 344 N.E.2d 383, 384, 381 N.Y.S.2d 451, 452 (1976) (res judicata effect of a prior

arbitration is a matter for courts rather than for arbitrators).

Other courts have held that the preclusive effect of a prior arbitration proceeding on claims asserted in a subsequent arbitration proceeding is arbitrable. See Consolidation Coal Co. v. United Mine Workers of America, Dist. 12, Local Union 1545, 213 F.3d 404 (7th Cir. 2000); Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126 (9th Cir. 2000); Olick, supra, 151 F.3d at 139-40; National Union Fire Ins. Co. of Pittsburgh v. Belco Petroleum Corp., 88 F.3d 129 (2d Cir. 1996).

The appellants cite only one case holding that the preclusive effect of a judgment on claims subsequently asserted in arbitration "is itself arbitrable." United States Fire Ins. Co. v. National Gypsum Co., 101 F.3d 813, 816 (2d Cir. 1996), cert. denied, 521 U.S. 1120 (1997).

This case falls in the first category, i.e., those that involve the preclusive effect of a prior judicial determination on claims asserted in a subsequent arbitration proceeding. Clearly, courts in the first two groups cited above would agree that the issue in this

case is to be decided by the judiciary. The principle stated in cases representative of the first group is that "even when arbitration is involved, [c]ourts should not have to stand by while parties re-assert claims that have already been resolved.'" In re Y & A Group Sec. Litigation, 38 F.3d at 382 (quoting Kelly, 985 F.2d at 1069)). "No matter what, courts have the power to defend their judgments as res judicata, including the power to enjoin or stay subsequent arbitrations." Id. (Emphasis added.)[2]

Courts in the third group have distinguished between cases like this one and those involving a prior arbitration. For example, the court in Olick, which involved both a prior judgment and a prior arbitration, explained:

> "While we have previously held that claims of res judicata based on a prior . . . judgment are an exception, see Telephone Workers Union of New Jersey v. New Jersey Bell Tel. [Co.], 584 F.2d [31], 31-32 (3d Cir. 1978), res judicata objections based on a prior arbitration do not implicate the institutional concerns underlying that holding. . . .

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[2]Because courts in the second group ascribe to the judiciary the authority to determine the preclusive effect of even a prior arbitration award, then, a fortiori, they would hold that the court is to decide the effect of a prior judicial determination.

> "We have previously held . . . that where there is a contractual provisions barring the re-arbitration of similar disputes between parties, the arbitrator is to decide the preclusionary effect, if any, of a previous arbitration. See Local 103 of the International Union of Elec., Radio, and Mach. Workers v. RCA Corp., 516 F.2d 1336, 1340 (3d Cir. 1975). The reasoning underlying this approach is that a provision regarding the finality of arbitration awards is a creature of contract and, like any other contractual provisions that is the subject of dispute, it is within the province of the arbitration unless it may be said 'with positive assurance' that the parties sought to have the matter decided by a court."

151 F.3d at 139 (emphasis added).

We agree with the holdings of those courts in the first group, and with the rationales expressed by those in the second and third groups, insofar as they are applicable to a case involving the preclusive effect of a prior judgment.[3] Alabama has a strong

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[3] Representative of the cases in the second group is Waterfront Marine Constr., in which the court reasoned:

> "[A}n arbitration panel is not generally bound by legal principles, does not have to explain or justify its decision, and the decision to explain or justify its decision, and the decision is not reviewed for legal errors. Rather, the arbitrators are entitled to make their decision based on what they deem to be just and equitable within the scope of the parties' agreement. . . . Consequently, when considering a please of res judicata, an arbitration panel could determine that the issues resolved in a prior arbitration should be revised, regardless of whether

interest in the finality of its courts' judgments. The courts of Alabama are not authorized to render advisory opinions, except in very limited circumstances. See, e.g., Carrell v. Masonite Corp., 775 So. 2d 121, 125 (Ala. 2000) ("Alabama's Declaratory Judgment Act bars trial courts from' issuing advisory opinions"); Ala. Code 1975, §12-2-10 (authorizing the Supreme Court to issue advisory opinions on "important constitutional questions" at the request of the Governor or the Legislature). Were we to adopt the position advocated by Baker and the PC, however, we would be establishing a procedure that would transform otherwise binding judicial decisions into mere "advisory opinions." Thus, Alabama has a strong policy against procedures such as the one advocated by the appellants.

We conclude that the trial court was the proper forum for

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the legal elements required for sustaining the plea were met. Allowing a plea of res judicata to be resolved by arbitration defeats the purpose of the judicially created doctrine -- to bring an end to the substantive controversy and to protect the parties from re-litigating previously decided matters."

468 S.E.2d at 903.

Merrill Lynch to present its collateral-estoppel defense. We turn, therefore, to the substance of that defense.

B. Identity of Issue and Parties

The appellants do not -- indeed, cannot -- seriously contend that the issues asserted in its action before the NASD are different from those involved in Alabama-Baker IV. In fact, at the heart of both cases is one dispositive factual issue. That issue is whether account number 754-96534 was a "personal account of Baker." If it was, it was subject to discovery, and Merrill Lynch could not be held liable for disclosing it.

That that issue was actually litigated in Alabama-Baker IV cannot be disputed. In its October 25, 1994, order, the trial judge declared: "The court specifically finds as a matter of fact that Baker's Merrill Lynch account [754-96534] is a personal account of Baker's." (Emphasis added.) Obviously, that finding was necessary to the judgment, because the action was commenced for the very purpose of discovering and preserving assets held for Baker by Merrill Lynch. Because this Court affirmed that judgment without an opinion, the correctness of the

findings on which the judgment was based is not before us in this case.

Indeed, the only element about which there is a colorable controversy is the identity of the parties. Specifically, Baker and the PC contend that the doctrine of collateral estoppel does not bar the PC's claims before the NASD, because, they insist, the PC was not a party in Alabama-Baker IV. To be sure, the PC was not a named party in that case. Ordinarily, "[a] party to the second suit will not be estopped from relitigating an issue unless all of the requisite elements exist. It is noteworthy that Alabama has not followed the trend of abolishing the requirement that parties be identical, sometimes referred to as the mutuality of estoppel requirement." McMillian v. Johnson, 878 F. Supp. 1473, 1520 (M.D. Ala. 1995), rev'd in part on other grounds, 88 F.3d 1554 (11th Cir. 1996), cert. denied, 521 U.S. 1121 (1997). "An exception is made to this requirement for parties in privity with a party to the prior action." (Emphasis added). Thus, regardless of the fact that the PC was not a named party in Alabama-Baker IV, it will be bound by that judgment if it was in privity with Baker.

" 'The term "privity" has not been uniformly defined with respect to [collateral estoppel].' " Hughes v. Martin, 533 So. 2d 188, 191 (Ala. 1988) (quoting Issue Preclusion in Alabama, 32 Ala. L. Rev. 500, 520-21 (1981)). Privity is often deemed, however, to arise from " '(1) the relationship of one who is privy in blood, estate, or law; (2) the mutual or successive relationship to the same rights of property; [or] (3) an identity of interest in the subject matter of litigation' ". Id. Thus, the existence of privity has generally been resolved " 'on an ad hoc basis in which the circumstances determine whether a person should be bound by or entitled to the benefits of a judgment.'" Id. See also Dairyland Ins. Co. v. Jackson, 566 So. 2d 723, 726 (Ala. 1990) (collecting cases).

"Generally, a corporation is in privity with its sole shareholder for collateral estoppel purposes. A ruling adverse to a controlling person of a corporation precludes the corporation from litigating that claim in a subsequent action." Jordache Enters., Inc. v. National Union Fire Ins. Co. of Pittsburgh, 204 W. Va. 465, 479 n. 16, 513 S.E.2d 692, 706 n. 16 (1998) (quoting 50

C.J.S. Judgment § 867, pp. 441-42 (1997) (emphasis added). See also Restatement (Second) of Judgments § 59(3) (b) (1982).

It is undisputed that Baker is the owner and sole shareholder of the PC. Moreover, in holding that the PC was collaterally estopped from asserting claims in arbitration that depended for their efficacy on a finding contrary to the finding of the court in Alabama-Baker IV, the trial court expressly found the following:

> "Mr. Baker has been the PC's only president and is the only person with a financial interest in the PC; the PC has had no employees since 1987; for years, the PC has not actively engaged in the practice of law (in fact, for years it has done nothing on a daily basis); it has held no meetings; it has kept no corporate minutes; it has paid no salaries; its funds have been used for Mr. Baker's personal purposes; . . . and Mr. Baker himself gave testimony suggesting that he and his PC were one and the same."

(Emphasis added.) Indeed, those findings are also undisputed.

On these facts, we conclude that Baker and the PC are in privity, and, therefore, that the identity-of-parties element of collateral estoppel is also satisfied. Consequently, the trial court correctly held that the PC's claims in arbitration are barred by collateral estoppel.

II. Waiver

Baker and the PC also contend that Merrill Lynch waived the right to object to arbitration. This is so, because, they insist, Merrill Lynch in Florida-Baker II sought to compel arbitration. Baker and the PC argue that, instead of moving to compel arbitration in that court, Merrill Lynch should have raised then the defense of collateral estoppel it now asserts. Failure to do so, they insist, constituted a waiver of the right to assert it here. We disagree with this argument, as did the trial court.

To be sure, courts have held that the right to object to arbitration may be waived. This principle was stated in ConnTech Dev. Co. v. University of Conn. Educ. Properties, Inc., 102 F.3d 677, 685 (2d Cir. 1996):

> "Moreover, by waiting until September of 1993 to raise this argument before the district court, UCEPI [University of Connecticut Education Properties, Inc.] waived the right to object on the basis of ConnTech's alleged violation of a condition precedent. If UCEPI understood performance to be a condition precedent to arbitration, then UCEPI could have asserted this argument well before September of 1993, by which point the arbitration proceedings had long been underway. An objection to the arbitrability of a claim must be made on a timely basis, or it is waived. See,

> e.g., Fortune, Alsweet & Eldridge, Inc. v. Daniel, 724 F.2d 1355, 1357 (9th Cir. 1983) (unjust to permit appellant to challenge arbitration, after voluntary participation for several months, shortly before arbitrator's decision); Owen-Williams v. Merrill Lynch, Pierce Fenner & Smith, Inc. 907 F. Supp. 134, 137 (D. Md. 1995) (plaintiff's willing submission of claims to arbitration without protest during 19 days of arbitration proceedings waived any right to contest arbitration of claims), aff'd, No. 96-1442, . . . (4th Cir. Dec. 2, 1996) (per curiam); International Longshoremen's Ass'n v. West Gulf Maritime Ass'n, 594 F. Supp. 670, 674 (S.D.N.Y. 1984) ('One who voluntarily participates in arbitration will not there after be heard to complain that the arbitrator was without authority to act.')."

Merrill Lynch's conduct in this dispute does not, however, run afoul of these principles. During the trial-court proceedings in Alabama-Baker IV, Merrill Lynch had no incentive to assert the arbitration clause. It had no arbitration agreement with the Bennetts, and Baker had not asserted any cross-claims against it.

When, on November 14, 1994, Merrill Lynch moved the court in Florida-Baker II to compel arbitration, it had no collateral-estoppel defense to the claims asserted by Baker and the PC This is so because the judgment in Alabama-Baker IV did not

become final, and thereby appealable, until January 13, 1995. Although the court in Florida-Baker II ordered arbitration of the dispute on December 20, 1994, as far as the record and briefs show, Baker and the PC took no action to commence arbitration proceedings until August 1999, when they filed their complaint before the NASD.

Indeed, on April 12, 1995, while Alabama-Baker IV was pending on appeal in this Court, the PC filed in Florida-Baker II its second amended complaint. The complaint contained three counts – two against the Bennetts and one against Merrill Lynch. The third count, the one against Merrill Lynch, was described as a count "For Enforcement of Arbitration Against Merrill." It stated in pertinent part:

> "34. Plaintiff's claims against Merrill are to be arbitrated before a panel of arbitrators of the National Association of Securities Dealers, Inc. pursuant to an order of this court dated December 20, 1994.
>
> "35. This court reserved jurisdiction to confirm the arbitration award and determine issues over which the arbitrators have no subject matter jurisdiction.

> "WHEREFORE, plaintiff demands no judgment on the Third Count pending the decision of the arbitrators."

(Emphasis added.)

Subsequently, the Bennetts moved the Florida court to dismiss the complaint. On June 21, 1995, that court entered an order styled: "Order Granting Defendants Bennetts' Motion to Dismiss Second Amended Complaint." The order stated in pertinent part:

> "THIS CAUSE came on to be heard upon the motion of defendants J.R. Bennett and Laura Bennett to dismiss the Second Amended Complaint and the court having heard argument of counsel, and being fully advised in the premises, it is hereby,
>
> "....
>
> "ORDERED AND ADJUDGED, that the Second Amended Complaint is dismissed. The court finds that the claims of the plaintiff in this case, Leon C. Baker, P.C., are merely an attempt to relitigate the claims made by Leon C. Baker individually, in the case number CV-94-05629, J.R. Bennnett and Laura JeanBennett v. Leon C. Baker, et al., Circuit Court in and for Jefferson County, Alabama, as affirmed by the Supreme Court of Alabama, case numbers 1940172, 1940207, 1940314, 1940371, and 1940643. The court further finds that Plaintiff's complaint, taken as true, asks this court to grant relief for the actions of Alabama courts and would effectively circumvent the

> orders of the Alabama courts on the same issues. Any challenge to the Alabama judgment and garnishment proceedings should be brought in Alabama."

(Emphasis added.) The parties disagree as to the legal effect of this order. Merrill Lynch construes it as dismissing the entire Florida action with prejudice. Baker and the PC, however, contend that the Florida court still retains "jurisdiction to confirm the arbitration award." We disagree with Baker and the PC.

"Rules applicable to the construction and interpretation of contracts are applicable to the construction and interpretation of judgments." Inter-Connect, Inc. v. Gross, 644 So. 2d 867, 868 (Ala. 1994). More specifically, in Price v.Price, 360 So. 2d 340 (Ala. Civ. App. 1978), the Court of Civil Appeals stated:

> "Judgments and decrees are to be construed like other written instruments. Wise v. Watson, 286 Ala. 22, 236 So. 2d 681 (1970). If there is uncertainty and ambiguity in a contract or judgment, the court must construe it so as to express the intent of the parties or the trial judge. Reeder v. Reeder, Ala. Civ. App., 356 So. 2d 202 (1978). Such intent can be derived from the provisions of the judgment. See Reeder v. Reeder; Sisco v. Empiregas, Inc., 286 Ala. 72, 237 So. 2d 463 (1970)."

360 So. 2d at 343 (emphasis added).

Nothing in the order of the Florida court suggests that the trial judge intended to retain jurisdiction for any purpose. On the contrary, the order clearly indicates the dismissal of the "Second Amended Complaint," and not merely the claims against the Bennetts. As we read it, the complaint was dismissed in toto. The dismissal carried with it count three, which was the count purporting to hold Merrill Lynch in the action. Any confusion about the meaning of the order should have been resolved in Florida before the time for taking an appeal expired. As we construe the order, there is no such action pending in that state.[4]

The trial court's holding as to whether a party has waived the right to compel arbitration is ordinarily reviewed under the abuse-of-discretion standard. See Thompson v. Skipper Real Estate Co., 729 So. 2d 287 (Ala. 1999); Companion Life Ins. Co. v. Whitesell Mfg., Inc., 670 So. 2d 897, 899 (Ala. 1995); Ex parte McKinney, 515 So. 2d 693 (Ala. 1987). We will apply the same

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[4]Furthermore, the record is devoid of evidence that Merrill Lynch participated in arbitration proceedings as a result of the appellants' complaint before the NASD, other than to file an answer, in which it also asserted it collateral-estoppel defense.

standard of review in a case, such as this one, involving a converse argument, namely, that a party has waived the right to resist arbitration. Under the circumstances of this case, the trial court did not abuse its discretion in refusing to dismiss Merrill Lynch's complaint on the waiver ground.

III. Forum Non Conveniens

Baker and the PC also contend that the trial court should have dismissed the complaint on the basis of Ala. Code 1975, § 6-5-430. We disagree with that contention. Section 6-5-430 provides, in pertinent part:

> "Whenever, either by common law or the statute of another state or of the United States, a claim, either upon contract or in tort has arisen outside this state against any person or corporation, such claim may be enforceable in the courts of this state in any county in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the claim had arisen in this state; provided, however, the courts of this state shall apply the doctrine of forum non conveniens in determining whether to accept or decline to take jurisdiction of an action based upon such claim originating outside this state and provided further that, if upon motion of any defendant it is shown that there exists a more appropriate forum outside this state,

> taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interests of justice, the court must dismiss the action without prejudice."

(Emphasis added.)

This section is inapplicable in this case. By its terms, it applies only to causes of action arising "outside this state." The factual basis for Baker and the PC's claims is Merrill Lynch's allegedly negligent disclosure to the Jefferson Circuit Court of the existence of account number 754-96534. An Alabama court ordered Merrill Lynch to establish an account for the Bennetts'S attorneys and to transfer the assets from account number 754-96534 to that account. It was Merrill Lynch's compliance with the Jefferson Circuit Court order that formed the basis for the claims asserted in Florida-Baker II and for the damages Baker and the PC now seek before the NASD.

It must also be remembered that the amount the PC seeks in arbitration is comprised of (1) the amount of the judgment originally rendered for the Bennetts in Alabama Baker-I (2)

$90,000 assessed by the Jefferson Circuit Court against Baker for civil contempt; (3) interest accrued on the Bennetts' judgment; plus (4) money expended by Baker in attorney fees and other expenses in an effort to avoid the Bennetts' Alabama judgment. In short, this is not a cause of action that "has arisen outside of this state." Because § 6-5-430 does not apply to this case, the trial court did not err in refusing to dismiss Merrill Lynch's complaint on forum non conveniens grounds.

IV. Summary

In summary, we have considered all the arguments of Baker and the PC and find no reason to reverse the order of the trial court. That order is, therefore, affirmed.

AFFIRMED.

Moore, C.J., and Houston, Lyons, and Johnstone, JJ., concur.

IN THE SUPREME COURT
OF ALABAMA

November 16, 2001

1992139
Leon C. Baker, P.C. and Leon C. Baker v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (Jefferson Circuit Court: CV-2000-2000)

ORDER

The application for rehearing filed in this cause is overruled.

Overruled - No Opinion

WOODALL, J. - MOORE, C.J., and Houston, Lyons, and Johnstone, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 16th day of November, 2001
/s/ Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

No. 01-1150

In The

Supreme Court of the United States

LEON C. BAKER P.C. and LEON C. BAKER, individually,

Petitioners,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alabama

BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER UNDER THE FACTS OF THIS CASE, THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 2 ("FAA") PERMITS A COURT, RATHER THAN ARBITRATORS, TO RULE ON ISSUES OF PRECLUSION (RES JUDICATA AND COLLATERAL ESTOPPEL)?

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JURISDICTION

The opinion of the Alabama Supreme Court was entered on August 31, 2001. An application for rehearing was filed on September 13, 2001 and was denied on November 16, 2001. This Petition for a Writ of Certiorari was filed within ninety days of the denial. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, Section 2, provides in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, shall be valid, irrevocable, and enforceable * * * .

STATEMENT OF THE CASE

Leon Baker is no newcomer to this Court. In the years during which this protracted dispute has been dragged out by Mr. Baker, he has filed no less than four unsuccessful petitions for a writ of certiorari. Likewise, this one should be denied as well.

I. Procedural History

On April 3, 2000, Merrill Lynch filed a Verified Complaint for Injunctive Relief and a Motion for Temporary Restraining Order with the Circuit Court for Jefferson County, Alabama. The Verified Complaint named as defendants Leon C. Baker, P.C. ("the P.C.") and Leon C. Baker individually ("Baker") (collectively, "Petitioners"). It asked that Defendants be barred from circumventing prior rulings that the Circuit Court of Jefferson County had made in a case styled *J. R. Bennett et al. v. Leon C. Baker et al.*, CV 94-5629. In particular, the Verified Complaint requested a permanent injunction barring the P.C. from prosecuting *Leon C. Baker, P.C. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, NASD Case No. 99-03764, an arbitration case that the P.C. had filed with the National Association of Securities Dealers, Inc. ("NASD") in August 1999.

The circuit court granted the aforementioned Motion and entered the requested Temporary Restraining Order. After the May 15, 2000 hearing, the trial court entered a May 23, 2000 Order granting Merrill Lynch's request for permanent injunctive relief. It later denied Defendant's new trial motion.

Baker filed an appeal with the Alabama Supreme Court. After due consideration, the Alabama Supreme Court affirmed the lower court's decision. It later denied Defendant's Motion for Rehearing.

II. Statement of Facts[1]

Unfortunately, Baker's recitation of the facts to this Court presents an inaccurate picture. Once the facts are accurately described, the petition for further review disappears rapidly.

The Madison County Litigation

The relevant events in this case date back to 1980. In that year, two Huntsville residents, J. R. Bennett and his wife, Laura, invested in a tax shelter that Baker, a tax attorney, had recommended and apparently designed. The tax shelter required the Bennetts to buy computers from a leasing company; however, unbeknownst to the Bennetts, Baker owned the leasing company. Moreover, the Internal Revenue Service eventually declared Baker's tax shelter to be "abusive" and denied the Bennetts their tax deduction.

After learning of Baker's undisclosed role in the leasing company and after settling their tax liability with the IRS, the Bennetts – who had paid Baker's leasing company $1,315,938 – sued Baker in the Circuit Court of Madison County, Alabama. They accused Baker of "knowingly creat[ing] a sham tax shelter[,]" "conspir[ing] to involve the Bennetts in the scheme[,]" and "intentionally misleading them as to the facts underlying the [shelter]." *Baker v. Bennett*, 603 So.2d 928, 934 (Ala. 1992).

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[1] This Statement of Facts is drawn from the Verified Complaint which was introduced into evidence at the May 15, 2000 hearing.

A jury rendered a $440,025 verdict against Baker and a judgment in that amount was duly entered.

Baker appealed the Madison County judgment to the Alabama Supreme Court, where it was affirmed unanimously. *See Baker*, 603 So.2d at 928. But Baker was not content to stop there. He filed a motion for reconsideration with The Alabama Supreme Court. It was denied. And he filed a petition for writ of certiorari with this Court. It too was denied.

When the Madison County judgment was entered against Baker, he did much more than exhaust his appellate rights. Specifically, Baker filed two Florida lawsuits in 1992 asking Florida state courts to undo the Madison County judgment or prevent collection thereon. (A third such lawsuit, filed by Baker's wife against the Bennetts and Merrill Lynch, was also filed in Florida state court in 1992.)

Baker's first Florida suit named the Bennetts as defendants and argued that the Alabama judgment was void. It was dismissed on summary judgment and affirmed on appeal. *See Baker v. Bennett*, 633 So.2d 91 (Fla. Dist. Ct. App. 1994). Baker moved the Florida appellate court to rehear the appeal (the motion was denied) and filed a petition in this Court as well (also denied).

In his second Florida case, Baker sued the Bennetts' attorneys, James L. North, J. Timothy Francis, and John W. Haley, and their respective law firms, including the Hare, Wynn, Newell & Newton firm. This complaint alleged malicious prosecution, slander, and abuse of process based on the Bennetts' Madison County case – *notwithstanding the fact that the Bennetts' attorneys had won*

that case. Baker lost this Florida case in the trial court, lost on appeal, and lost in this Court once again when his petition for writ of certiorari was denied. As part of this litigation, a Florida appeals court sanctioned Baker for taxing judicial resources with his frivolous filings.

Baker is a wealthy man: it is a matter of public record that, as of 1999, he had assets of over $40,000,000. As such, it would not have been unduly difficult for him to pay the $440,025 Madison County judgment. Despite his wealth, however, and despite his exhaustion of all appellate remedies – including, as noted, a petition for certiorari denied by this Court – Baker adamantly refused to satisfy the Madison County judgment.

The Jefferson County Litigation (CV 94-5629)

Baker's refusal to pay the Madison County judgment forced the Bennetts to take action. In August 1994, after unsuccessfully attempting to garnish Baker's securities, the Bennetts filed suit in the Circuit Court of Jefferson County, Alabama to enforce their judgment through equitable means, pursuant to Ala. Code § 6-6-180 and § 6-6-185 (1975). The Bennetts' Jefferson County lawsuit, as noted *supra*, was styled *J. R. Bennett et al. v. Leon C. Baker et al.*, CV 94-5629 ("CV 94-5629"). The complaint named as defendants Baker, Merrill Lynch, and two other brokerage firms. The case was assigned to the Honorable Roger M. Monroe.

The Circuit Court of Jefferson County decided CV 94-5629 in the Bennetts' favor and against Baker. It ordered Merrill Lynch to transfer funds from a specific Merrill Lynch account – account number 754-96534

("Account 754-96534") – to the Bennetts' attorneys in satisfaction of the Madison County judgment. In October 1994, Merrill Lynch complied with the court's order and transferred $724,353.33 to the Bennetts' attorneys from Account 754-96534. The $724,353.33 represented the underlying $440,025 judgment, interest on the judgment, and almost $90,000 in civil contempt fines levied against Baker for his refusal to comply with the Court's orders.

In the course of ruling for the Bennetts, the Circuit Court of Jefferson County made two findings in CV 94-5629 that are of critical importance. It is these two findings that afforded the primary basis for the equitable relief that Merrill Lynch sought below.

First, in CV 94-5629, the Circuit Court of Jefferson County held that Account 754-96534 – the account from which the $724,353.33 was transferred – belonged to Baker individually, not to the P.C., and could therefore be used to satisfy the Bennetts' judgment.

The court made this finding *at least four different times*, in four different orders: (1) in an October 14, 1994 Order, p. 6 (Account 754-96534 was Baker's *"personal* brokerage account") (emphasis added); (2) in an October 18, 1994 Order, p. 1 (same); (3) in an October 21, 1994 Order, p. 2 (same); and (4) in an October 25, 1994 Order.

The court's October 25, 1994 Order is particularly relevant to the Alabama courts' decisions below. In pertinent part, it reads as follows:

> *The Court specifically finds as a matter of fact that Baker's Merrill Lynch Account #754-96534 13-3060422 is a personal account of Baker's.* Baker has asserted, in a letter to this Court and in an

> affidavit, that such account is a "P.C." account. Baker contends that the securities made subject to this Court's orders . . . are actually owned by Leon C. Baker, P.C., a New York corporation, and not by Baker individually. However, there is absolutely no evidence in the record in this case that the account in question is anything other than a personal account.

October 25, 1994 Order, pp. 4-5 (emphasis added). Instead the Court found that:

> The only competent and admissible evidence before this Court is the brokerage statement from such securities account which shows unequivocally that the account is titled in the name of Leon C. Baker, not Leon C. Baker, P.C. Such brokerage statement was produced by defendant Merrill Lynch and was offered into evidence by the plaintiffs and admitted without objection by any defendant. Moreover, the address on such account is Baker's residence address in Boca Raton, Florida, not New York. In its Order of October 14, 1994, this Court specifically found that Baker's Merrill Lynch Account #754-96534 13-3060422 was a personal account of Baker's.

Id.

In order to be as clear and to the point as humanly possible, the trial judge continued with the following stark findings.

> *Baker has now had three full and fair opportunities to present any competent and admissible evidence to contradict his personal ownership of such account, but he has failed to do so. Accordingly, this Court's factual finding that Merrill Lynch Account*

#754-96534 13-3060422 is a personal account of Baker's is specifically reaffirmed.

Id. (emphasis added).

The second crucial finding by the Circuit Court of Jefferson County in CV 94-5629 was a finding holding Merrill Lynch harmless for the transfer of the $724,353.33.

The court made this finding on two separate occasions: (1) in an October 27, 1994 Order ("Merrill Lynch is not liable to Leon C. Baker or Leon C. Baker, P.C. as a result of Merrill Lynch's transfer and liquidation of securities as directed by this Court."); and (2) in a November 14, 1994 Order, p. 2 ("Merrill Lynch is hereby directed to wire transfer $724,353.33 . . . to counsel for the Bennetts. *The Court specifically finds and holds that Merrill Lynch is not liable to Leon C. Baker or Leon C. Baker, P.C. as a result of Merrill Lynch's compliance with the Orders of this Court.*") (emphasis added).

Baker appealed the Circuit Court of Jefferson County's order to the Alabama Supreme Court; actually, he filed at least *six different notices of appeal* to the Alabama Supreme Court. The Alabama Supreme Court, however, affirmed the circuit court's order in its entirety, without opinion. Baker later filed a motion for rehearing; the Alabama Supreme Court denied it. He then filed another petition for writ of certiorari with this Court; it was likewise denied.

Other Litigation

When the Circuit Court of Jefferson County entered its orders in CV 94-5629 enforcing the Madison County

judgment, Baker and the P.C. did not simply rely on their appellate rights. Rather, *during the pendency of CV 94-5629*, the P.C. filed a lawsuit in Florida state court styled *Baker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CV 94-8318. It named the Bennetts and Merrill Lynch as defendants and alleged abuse of process and due process violations based on the transfer of assets that the Circuit Court of Jefferson County had ordered.

In November 1994, Merrill Lynch moved to compel arbitration of the P.C.'s claims against it in *Baker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CV 94-8318; in December 1994, the Florida Circuit Court granted that motion. However, the Florida court's December 1994 order compelling arbitration was superceded by a June 12, 1995 Order from that court dismissing the *entire* case with prejudice. *Baker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CV 94-8318, slip op. at p. 2. The Florida court's order of dismissal made it clear that the P.C. could not turn to other fora to undo the Jefferson County Circuit Court's orders:

> The court finds that the claims of the plaintiff in this case, Leon C. Baker, P.C., are merely an attempt to relitigate the claims made by Leon C. Baker individually, in the case number CV-94-5629, *J. R. Bennett and Laura Jean Bennett v. Leon C. Baker, et al.*, Circuit Court in and for Jefferson County, Alabama, as affirmed by the Supreme Court of Alabama, case numbers 1940172, 1940207, 1940314, and 1940643. The court further finds that Plaintiff's complaint, taken as true, asks this court to grant relief for the actions of Alabama courts and would effectively circumvent the orders of the Alabama

> courts on the same issues. Any challenge to the Alabama judgment and garnishment proceedings should be brought in Alabama.

Baker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., CV 94-8318, slip op. at p. 2.

Baker and his P.C. were undaunted by the foregoing Florida court's dismissal order. On September 11, 1995, the P.C. sued the Bennetts' lawyers in the United States District Court for the Southern District of New York. In this lawsuit, the P.C. raised the same abuse of process and due process allegations that the Florida state court had earlier dismissed with prejudice. Upon motion by the defendants, the case was transferred to the United States District Court for the Northern District of Alabama.

The district court eventually dismissed the P.C.'s complaint. It held – like the Florida state court in *Baker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CV 94-8318 – that the P.C. was barred by the Jefferson County Circuit Court's prior decisions in CV 94-5629, as affirmed by the Alabama Supreme Court. However, the district court did not dismiss cross-claims and counterclaims that the Bennetts' attorneys had filed against Baker and his P.C., respectively. Those claims were allowed to proceed to trial, where they were settled at the close of the evidence for $250,000. Also, and more importantly, as part of the settlement Baker and his P.C. agreed to a permanent injunction forever barring them from suing the Bennetts or their attorneys.

Pursuant to the settlement and injunction agreement in the case before the district court in Alabama, Baker and his P.C. dismissed with prejudice *yet another lawsuit* that

they had filed against the Bennetts' attorneys. This suit was filed in New York state court *after* Judge Clemon had dismissed the P.C.'s claims against the attorneys.

Baker's litigation efforts have drawn their fair share of condemnation. In CV 94-5629, Judge Monroe fined Baker almost $90,000 for wilfully disobeying his orders. A Florida appellate court also sanctioned Baker for his baseless filings in one of his six *Bennett* cases. And in an unrelated case, *Baker v. Latham Sparrowbush Associates*, 72 F.3d 246 (2nd Cir. 1995), a "tortuous" piece of litigation that Baker dragged out for more than a decade, *id.* at 253, the United States Court of Appeals for the Second Circuit condemned Baker's "delaying tactics" and his *"protracted history of . . . efforts to sidestep adverse rulings. . . . " Id.* (emphasis added).

The Arbitration

Against this backdrop, in August 1999 Baker's P.C. filed an arbitration claim (the "Arbitration") with the NASD, asking that Merrill Lynch be held liable for the $724,353.33 that was transferred to the Bennetts' attorneys pursuant to Judge Monroe's order, as well as for $500,000 in legal expenses. Through this arbitration proceeding, the P.C. was again plainly attempting to circumvent the prior rulings of the Circuit Court of Jefferson County in CV 94-5629. In particular, the P.C. was asking the arbitration panel to disregard the two critical findings by Judge Monroe noted *supra*.

First, the P.C. was asking the arbitrators to conclude that Account 754-96534 was a P.C. account, not a personal account. The P.C. made this argument even though the

Circuit Court of Jefferson County had ruled that the account was a personal account, and its judgment was affirmed by the Alabama Supreme Court on appeal. *See, e.g.*, October 25, 1994 Order, pp. 4-5 ("The Court specifically finds as a matter of fact that Baker's Merrill Lynch Account #754-96534 13-3060422 is a personal account of Baker's.").

Second, Baker's P.C. was asking the arbitrators to find that the transfer to the Bennetts' attorneys was illegal and that Merrill Lynch is liable therefor. *The P.C. made this argument notwithstanding the Circuit Court of Jefferson County's express holding (later affirmed by the Alabama Supreme Court) that Merrill Lynch was not liable to Baker or his P.C. for the transfer. See* October 27, 1994 Order ("Merrill Lynch is not liable to Leon C. Baker or Leon C. Baker, P.C. as a result of Merrill Lynch's transfer and liquidation of securities as directed by this Court."); November 14, 1994 Order, p. 2 ("The Court specifically finds and holds that Merrill Lynch is not liable to Leon C. Baker or Leon C. Baker, P.C. as a result of Merrill Lynch's compliance with the Orders of this Court.").

In order to prevent judicial subterfuge, and in an attempt to stop Defendants' ten-year campaign to avoid responsibility for the Madison County judgment, Merrill Lynch filed this suit and asked that the Arbitration be enjoined. The requested relief was the only way the specific findings of the Jefferson County Circuit Court – and its jurisdiction – could be properly enforced. Anything less would have made a mockery of the Alabama state court's authority.

ARGUMENT

I. UNDER THE FACTS OF THIS CASE, THERE IS NO DISPUTE AMONG COURTS

It is easy to distinguish three of the four cases that Defendants cite for their position that there is a split in authority. Simply put, these cases do not apply to the case at bar and are only used to cloud the question for this Honorable Court. *National Union Fire Ins.*, 88 F.3d at 135, *Chiron Corp.v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126 (9th Cir. 2000), and *Consolidated Coal Co. v. United Mine Workers*, 213 F.3d 404 (7th Cir. 2000) involve the prior preclusive effect of an *arbitration* award. If the preclusive order in question was entered by arbitrators, the argument in favor of allowing an arbitrator to decide the preclusive effect of the prior order is much stronger. Likewise, an arbitration agreement cannot strip a court of its inherent authority to enforce its prior judgment. These cases simply do not contemplate the question that Baker has put before this Court.

The fourth and final case that Defendants cite – *United States Fire Ins. Co. v. National Gypsum Co.*, 101 F.3d 813 (2d Cir. 1996) – is also distinguishable, albeit on other grounds. In that case, the Second Circuit indeed held that arbitrators had to decide the preclusive effect of a prior court judgment. It so held, however, *only* because the district court could not resolve the collateral estoppel question independently. That is, in order to resolve the collateral estoppel dispute, the district court had to interpret a written agreement that was itself to be interpreted by arbitration. *United States Fire Ins. Co.*, 101 F.3d at 816 ("We hold that the dispute in this case is within the

agreement to arbitrate, *because* in order to reach its conclusion that the issues concerning costs of defense were identical, the district court found it necessary to interpret the . . . [a]greement.") (emphasis added). Here, of course, the circuit court did *not* have to interpret a written agreement in order to decide that Defendants were collaterally estopped. The two scenarios are completely different.

Furthermore, the party seeking arbitration in *United States Fire Ins. Co.* had not engaged in a protracted campaign to evade the allegedly-preclusive judgment. That is an important and distinguishing factor, specific to this case.

II. PETITIONERS HAVE NOT PROPERLY PRESERVED THE ARGUMENT THEY PRESENT HERE

At the trial court level, Baker failed to argue that the trial court could not decide the collateral estoppel question – instead, Petitioners affirmatively asked the Alabama State Court to decide the collateral estoppel question in their favor, arguing that the P.C. was neither a party nor privy to CV 94-5629.

For that matter, only *one* of the cases Petitioners cite in their Petition was cited to Circuit Court, and that case – *National Union Fire Ins. of Pittsburgh v. Belco Petroleum Corp.*, 88 F.3d 129 (2d Cir. 1996) – was cited in Defendants' *new trial motion*, filed after the Circuit Court had heard testimony and after he had entered a permanent injunction.

Accordingly, this Court should not address Defendants' argument that collateral estoppel is an issue that

should be resolved by the arbitrators. That argument has not been preserved for appellate review by this Court.

CONCLUSION

The Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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(4)

No. 01-1150

In the Supreme Court of the United States

Leon C. Baker P.C. and Leon C. Baker, individually,
Petitioners

v.

Merrill Lynch, Pierce, Fenner & Smith Inc.,
Respondent

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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Date: April 3, 2002

In the Supreme Court of the United States

Leon C. Baker P.C. and Leon C. Baker, individually,
Petitioners

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Respondent

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

Petitioners, Leon C. Baker P.C. ("P.C.") and Leon C. Baker ("Baker"), individually, submit this Supplemental Brief pursuant to United States Supreme Court Rule 15, paragraph 8.

I

On February 25, 2002 this Court granted certiorari in *Howsam v. Dean Witter*, case No. 01-800. The issue in

that case is substantially identical to the issue in this case. In both cases the basic question is this: When the parties to a contract agree that *all* their disputes shall be submitted to arbitration, are affirmative defenses, nevertheless, to be ruled on by courts rather than by the arbitrator? In this case the alleged affirmative defense is res judicata. In *Howsam*, it is statute of limitations.

When a petition for certiorari presents an issue that is similar to an issue already pending before this Court in another case in which certiorari has been granted, the issue is obviously an important one worthy of this Court's consideration. The grant of certiorari in *Howsam* is an additional reason to grant certiorari in this case.

Moreover, this case raises the issue considerably more clearly than *Howsam*. In tha case, Dean Witter contends that a six year limitation in the rules of the National Association of Securities Dealers (NASD) on the time for filing an arbitration claim is not analogous to a statute of limitations. Rather, Dean Witter argues, the time limitation is a condition of the arbitration agreement itself. Dean Witter contends (1) that it agreed to arbitrate only claims which were less than six years old, and (2) that questions as to whether the parties agreed to arbitrate a particular dispute are to be determined by courts not the prospective arbitrators.

Dean Witter's argument in *Howsam* invokes the difference between (i) a case in which there is a dispute as to whether the parties entered into any arbitration agreement at all and (ii) one in which the parties agree they entered into an arbitration agreement but disagree as to

whether their current dispute is covered by their arbitration agreement.

The first category, whether there was any arbitration agreement at all, is indisputably an issue for courts to decide. But if the parties indisputably entered into an arbitration agreement, then an issue as to the scope of the arbitration agreement might well be for the arbitrator, especially if the parties did agree, as they did in this case, to submit *all* their disputes to arbitration.

The ruling of the Alabama courts is unabashedly that the agreement is irrelevant (and, therefore, so is the Federal Arbitration Act). They insist that courts, not arbitrators, must rule on preclusion defenses, regardless of what the parties may have agreed. There is no ambiguity as to the issue presented by this case, and this is an even clearer case than *Howsam* for granting a petition for certiorari.

A grant of certiorari in this case would, therefore, bring the issue to this Court even more clearly than does the *Howsam* case as to what disputes the the parties had agreed to arbitrate.

II

A case note, Arbitration–Standard of Review, 115 Harvard Law Review 1267 (February 2002), discusses a decision of the Tenth Circuit Court of Appeals, *Bowen v. Amoco Pipeline Company*, 254 F.3d 925 (10th Cir. 2001),

which raises an issue as to the roles of courts and arbitrators similar to that in the present case and *Howsam*, but from a different perspective. [1]

In all three cases the issue is: May courts disregard an agreement of the parties as to which of their disputes should be arbitrated? In the present case the Alabama courts took it upon themselves to rule on a preclusion defense even though the parties had agreed to arbitrate *all* their disputes. In *Bowen*, by contrast, the district court and the Tenth Circuit Court of Appeals disregarded the agreement of the parties that the award of the arbitrators *should* be subject to judicial review if the losing party contended that the award was not supported by the evidence. Both courts, despite this agreement, declined to review whether the award was supported by evidence.

The Tenth Circuit recognized that the Ninth and Fifth Circuits had reached conclusions contrary to its own. This conflict among those Courts of Appeals is analogous to the conflicts among the Courts of Appeals and the state courts set forth in the Petition for Certiorari. Counsel for Amoco Pipeline Company have informed us, however, that their client decided not to seek certiorari in that case.

1.With the Permission of the Editors of the Harvard Law Review, a copy of the Note is attached to this Supplemental Memorandum.

CONCLUSION

The additional authorities cited above support the application for a Writ of Certiorari.

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ARBITRATION — STANDARD OF REVIEW — TENTH CIRCUIT REJECTS CONTRACTUAL EXPANSION OF JUDICIAL REVIEW OF ARBITRATION AWARDS. — *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001).

In enforcing arbitration agreements under the Federal Arbitration Act (FAA),[1] the Supreme Court has held that federal policy does not require that arbitration follow any particular set of procedural rules.[2] Federal policy instead supports arbitration under the variety of procedural rules defined by private agreements.[3] This characterization of federal policy has led two U.S. courts of appeals to conclude that private parties may contract around the procedural provisions of the FAA that limit judicial review of arbitration awards.[4] Recently, in *Bowen v. Amoco Pipeline Co.*,[5] the Tenth Circuit explicitly rejected this conclusion.[6] The court reasoned that enforcement of contractual provisions providing for expanded judicial review would undermine federal policies and interfere with the judicial process.[7] This reasoning, however, rests on a construction of the FAA that undermines the federal policy supporting enforcement of voluntary arbitration agreements and threatens the viability of arbitration as an alternative to litigation.

In 1993, Ernest Bowen noticed oily contamination in a creek located on his property.[8] He filed a complaint with the Oklahoma Corporate Commission (OCC), which traced the pollution to oil that had escaped from one of the pipelines beneath the creek.[9] The OCC recommended that the pipelines' owners uncover their lines to expose past or present leaks.[10] One owner, Amoco Pipeline Company, refused to comply with this recommendation.[11]

Frustrated by Amoco's refusals, Bowen and his wife filed suit in the U.S. District Court for the Eastern District of Oklahoma.[12] In response, Amoco moved to stay the proceedings pursuant to a mandatory arbitration provision contained in the document governing the

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1 Pub. L. No. 401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–15 (2000)).

2 *See* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989).

3 *Id.* ("Just as [parties] may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." (internal citation omitted)).

4 *See* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997); Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 997 (5th Cir. 1995).

5 254 F.3d 925 (10th Cir. 2001).

6 *Id.* at 933.

7 *Id.* at 933–37.

8 *Id.* at 927.

9 *Id.*

10 *Id.* at 928.

11 *Id.*

12 *Id.*

pipeline easement.[13] The district court granted the motion and ordered resolution of the dispute by arbitration.[14]

In 1999, the parties submitted their case to a panel of three arbitrators.[15] The parties agreed that the panel would apply the Rules for Non-Administered Arbitration of Business Disputes with one significant modification: each party would have the right to appeal the panel's decision to the district court "on the grounds that the award [was] not supported by the evidence."[16] Following arbitration proceedings, the panel awarded the Bowens $5,373,000 in compensatory and punitive damages.[17]

Pursuant to section 9 of the FAA, the Bowens filed a motion in district court to confirm the award.[18] Amoco, in turn, filed a notice of appeal under the modified rules of the arbitration agreement.[19] The district court declined to apply the parties' contractually expanded standard of review to the award.[20] The court instead applied the FAA's narrower standard,[21] under which it granted the Bowens' motion for confirmation and rejected Amoco's notice of appeal.[22]

The Tenth Circuit affirmed. Writing for the panel, Chief Judge Tacha[23] considered the "difficult question" posed by the competing standards of review specified by the parties' agreement and by the FAA.[24] The court acknowledged the FAA's policy of "ensur[ing] judicial enforcement of private arbitration agreements," but argued that the Fifth and Ninth Circuits had erred in concluding that this policy sanctioned parties' "interfere[nce] with the judicial process."[25] In addi-

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13 *Id.* at 929 & n.1.

14 *Id.* at 928.

15 *Id.* at 930.

16 *Id.* (quoting the parties' agreement) (internal quotation marks omitted).

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at 930, 933.

21 Section 10(a) of the FAA provides that district courts may vacate arbitration awards under the following circumstances:

> (1) Where the award was procured by corruption, fraud, or undue means.
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a) (2000).

22 *Bowen*, 254 F.3d at 930.

23 Senior Circuit Judge Gibson (sitting by designation) and Judge Lucero joined Chief Judge Tacha's opinion.

24 *Bowen*, 254 F.3d at 933.

25 *Id.* at 933–34.

tion, the contractual provision threatened to frustrate other federal policies furthered by the FAA, including those favoring arbitral finality and independence.[26] Whether the provision did in fact frustrate these policies, the court argued, was the "key question,"[27] because the policies served by the FAA circumscribe the range of alternative procedural rules that parties may adopt.[28]

Finding that these policies would be poorly served by enforcing the parties' provision for expanded judicial review, the court reviewed the award in accordance with the narrower standards defined by the FAA and by judicial interpretations of the Act.[29] Under these standards,[30] Chief Judge Tacha argued, the arbitration panel had not exceeded its authority in ordering the cleanup of the Bowens' property, providing an escrow account for that purpose, or awarding punitive damages.[31]

In answering the "difficult question" posed by *Bowen*, the Tenth Circuit expressed legitimate concerns[32] regarding parties' ability to modify the public process of judicial review through private agreement. The court's characterization of this ability as fundamentally inconsistent with the policies of the FAA, however, is less tenable. In justifying its characterization, the court relied on questionable constructions of the Act's statutory language and legislative history, and on a flawed understanding of its underlying policies. These unstable foundations led the court to deny the disputing parties the full benefit

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26 *Id.* at 935.

27 *Id.*

28 *Id.* The court found that — unlike other rules clearly modifiable by contract — the procedural rule in question "threaten[ed] to undermine the policies behind the FAA." *Id.* The court considered it "illogical" to hold that "the FAA's policy of ensuring judicial enforcement of arbitration agreements is well served by allowing for expansive judicial review after the matter is arbitrated." *Id.*

29 *Id.* at 937.

30 The court described the standard of review provided for by the FAA as "strictly limited," a "highly deferential standard [that] has been described as 'among the narrowest known to the law.'" *Id.* at 932 (quoting *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995) (quoting *Litvak Packing Co. v. United Food & Commercial Workers, Local Union No. 7*, 886 F.2d 275, 276 (10th Cir. 1989)) (internal quotation marks omitted)) (internal quotation marks omitted).

31 *Id.* at 938–40.

32 As Judge Kozinski noted in his concurring opinion in *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997), enforcement of contractually modified standards of review, unless appropriately limited, has the potential to force reviewing courts to engage in work different from that which they routinely perform. *See id.* at 891 (Kozinski, J., concurring) (considering the possibility that contractual provisions may require reviewing courts to decide matters by flipping a coin). Like the provisions in dispute in *LaPine*, however, the provision in dispute in *Bowen* required application of a standard presumably familiar to reviewing courts. *Compare LaPine*, 130 F.3d at 887 (reporting that the arbitration agreement at issue called for application of "not supported by substantial evidence" and "conclusions of law are erroneous" standards), *with Bowen*, 254 F.3d at 930 (noting specification of "not supported by the evidence" standard). Thus, although legitimate in extreme cases, the Tenth Circuit's concerns appear only tangentially implicated by the particular provision on which the parties had agreed.

of their bargain, undermining the very objectives the court sought to further.

The Tenth Circuit began its analysis by examining section 10 of the FAA, ultimately concluding that the section provides "explicit guidance"[33] supporting narrowly limited review to "ensure[] judicial respect for the arbitration process" and to "preserv[e] [its] independence."[34] Neither the statutory text nor its authoritative interpretations, however, appear to warrant this narrow understanding of parties' freedom to shape the scope of judicial review. Although section 10 enumerates exceptions to the general rule of enforceability for arbitration awards, it does not indicate that these exceptions were intended to form a comprehensive list.[35] Courts have accordingly supplemented the section with judicially crafted exceptions. The most notable is the exception discussed in *Bowen* for arbitration awards that demonstrate "manifest disregard of the law."[36] The panel's application of this exception — one not expressly provided for by section 10 — undermines its assertion that the statute provides explicit and unalterable guidance limiting judicial review of arbitration awards.

The congressional debate that preceded enactment of the FAA, moreover, reflects almost exclusive concern with remedying judicial reluctance to enforce private arbitration agreements.[37] As the Tenth Circuit noted, the Supreme Court has interpreted this history as reflecting a clear purpose to "place an arbitration agreement upon the same footing as other contracts."[38] Thus, there is little support in the legislative history for the proposition that the Act's judicial review provisions may not be contractually modified because doing so would frustrate independent congressional objectives. Instead, the record suggests that the Act's judicial review provisions are subordinate to

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33 *Bowen*, 254 F.3d at 934.

34 *Id.* at 935.

35 Indeed, the section provides that district courts "*may*" vacate arbitration awards in "*any*" of the described cases, 9 U.S.C. § 10 (2000) (emphasis added), phrasing that is less restrictive than language providing that district courts *must* vacate awards in *only* the described circumstances.

36 This exception derives from Supreme Court dictum in *Wilko v. Swan*, 346 U.S. 427 (1953), in which the Court suggested that "the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." *Id.* at 436–37; *see* Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1257 (2000).

37 The House report that accompanied the FAA stated that "[t]he need for the law arises from an anachronism of our American law" that had caused American courts to "refuse[] to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction." H.R. REP. NO. 68-96, at 1–2 (1924); *see also* IAN R. MACNEIL, AMERICAN ARBITRATION LAW 33 (1992) (noting reformers' frustration with the unenforceability of arbitration agreements).

38 *Bowen*, 254 F.3d at 933 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–20 (1985) (quoting H.R. REP. NO. 96, at 1 (1924)) (citation and internal quotation marks omitted)) (internal quotation marks omitted).

the statute's overall aim of ensuring that arbitration agreements are enforced just as all other private agreements are — according to their terms.

In light of the inconclusive guidance provided by the FAA's language and legislative history, the Tenth Circuit placed considerable emphasis on the policies underpinning the Act. The court argued that the Supreme Court's analyses of these policies demonstrate that the FAA "is more than a collection of default rules, which parties may alter with complete discretion."[39] In addition to the FAA's "primary policy ensuring judicial enforcement of private agreements to arbitrate,"[40] the Tenth Circuit claimed, the Act furthers secondary federal policies — including arbitral independence and creativity — that limit private parties' abilities to define the terms of arbitration agreements.[41]

The Tenth Circuit cited the Supreme Court's opinion in *Volt Information Sciences, Inc. v. Board of Trustees*[42] as support for the assertion that FAA policies may preclude the enforcement of privately modified arbitration rules. The panel emphasized that although the *Volt* Court upheld the enforceability of an agreement that modified federal arbitration rules by incorporating state procedures, it did so because the agreement could be enforced "*without doing violence to the policies* behind . . . the FAA."[43] From this phrase, the Tenth Circuit inferred the existence of independent federal policies limiting the enforceability of privately modified arbitration rules. This reading, however, neglects the Supreme Court's subsequent elaboration that "applying the state rule would not 'undermine the goals and policies of the FAA' because the very purpose of the Act was to 'ensur[e] that private agreements to arbitrate are enforced according to their terms.'"[44] *Volt*, then, suggests that the Tenth Circuit's emphasis on policies favoring the independence and finality of arbitration is misplaced. Federal policy instead appears firmly to favor the faithful enforcement of arbitration agreements according to their terms.

The Tenth Circuit found additional support for its interpretation of the FAA in the Supreme Court's earlier decision in *Southland Corp. v. Keating*.[45] The panel pointed to *Southland*'s holding that federal arbitration law preempts state procedural rules that "require a judicial forum for the resolution of claims which the contracting parties agreed

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[39] *Id.* at 935.

[40] *Id.* at 934.

[41] *See id.* at 935.

[42] 489 U.S. 468 (1989).

[43] *Bowen*, 254 F.3d at 934 (quoting *Volt*, 489 U.S. at 479 (emphasis added)) (internal quotation marks omitted).

[44] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688 (1996) (citation omitted) (quoting *Volt*, 489 U.S. at 478).

[45] 465 U.S. 1 (1984).

to resolve by arbitration."[46] From this statement, the court concluded that federal arbitration policies take precedence over state law and, a fortiori, over private agreements as well. But the federal arbitration policy with which the *Southland* Court appears most concerned is the policy supporting the enforcement of parties' agreements. Indeed, the Court identified the FAA's primary purpose as remedying "the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements."[47] Here again, the Tenth Circuit provided an incomplete description of Supreme Court precedent that, rather than limiting, appears to maintain the FAA's "broad principle of enforceability."[48]

Ultimately, then, the Tenth Circuit's concerns over permitting private parties to expand judicial review of arbitration awards find little support in the language, legislative history, or underlying policies of the FAA. To the extent that it attempts to preclude such expansion, *Bowen* mischaracterized the FAA and its primary objective. Further, by limiting parties' abilities to shape arbitral procedures, the Tenth Circuit diminished the likelihood that parties will view arbitration as a fair,[49] voluntary,[50] and prudent[51] alternative to litigation. Arbitration, as the Tenth Circuit noted, presents a valuable means of "avoid[ing] the expense and delay of court proceedings."[52] Yet arbitration will secure these savings only if private parties elect to adopt it. Many parties, as evidenced by *Bowen* and cases arising in similar contexts,[53] appear to tie their commitments to arbitration to the availability of contractually modified standards of judicial review.

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46 *Bowen*, 254 F.3d at 935 (quoting *Southland*, 465 U.S. at 10) (internal quotation marks omitted).

47 *Southland*, 465 U.S. at 14.

48 *Id.* at 11.

49 *See* Cole, *supra* note 36, at 1201 & n.8 (citing social psychological research demonstrating that parties view dispute resolution as more fair when they are vested with procedural control).

50 Because "[lawyers drafting commercial agreements are usually unwilling to spend the time to negotiate . . . provisions for judicial review because they often consider the possibility of future litigation too remote," Stephen A. Hochman, *Judicial Review To Correct Arbitral Error — An Option To Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103, 120 (1997), those who do negotiate such provisions likely do so on behalf of parties that view the provision as a significant aspect of their agreement. Invalidating a modified judicial review provision while enforcing the remainder of the agreement may thus bind parties in a manner to which they never would have agreed.

51 *See* Stephen P. Younger, *Agreements To Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 241 (1999) (referring to "growing concern" over the lack of appellate recourse left to parties "afflicted by maverick arbitration awards" that sometimes "fall[] well outside the reasonable expectations of the parties").

52 *Bowen*, 254 F.3d at 932 (quoting *Foster v. Turley*, 808 F.2d 38, 42 (10th Cir. 1986) (internal quotation marks omitted)) (internal quotation marks omitted).

53 *See, e.g.*, UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992 (8th Cir. 1998); LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997); Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993 (5th Cir. 1995); Chi. Typographical Union v. Chi. Sun-Times, Inc., 935 F.2d 1501 (7th Cir. 1991).

Supreme Court, U.S.
FILED
APR 3 2002
OFFICE OF THE CLERK

No. 01-1150

In the Supreme Court of the United States

Leon C. Baker P.C. and Leon C. Baker, individually,
Petitioners

v.

Merrill Lynch, Pierce, Fenner & Smith Inc.,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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Date: April 3, 2002

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Preliminary Statement

Simultaneously with the filing of this Reply Brief Petitioners are submitting a Supplemental Brief pursuant to Supreme Court Rule, Paragraph 8. The most important matter set forth in the Supplemental Brief is that this Court has granted certiorari in *Howsam v. Dean Witter,* No. 01-180, which presents substantially the same issue as this case.

In that case, just as in this one, the question is whether courts should rule on affirmative defenses

notwithstanding that the parties have contracted to submit *all* their disputes to arbitration. The grant of certiorari in *Howsam* makes clear that the issue raised by this case is worthy of, and ripe for, consideration by this Court. Petitioners respectfully refer the Court to that Brief.

The bulk of Merrill Lynch's brief—twelve of its fifteen pages—is devoted to invective impugning the character of Petitioner Baker. Like all ad hominem argument, it is designed to divert the attention of the reader from the relevant considerations. When such irrelevant and improper tactics are directed at people as sophisticated as the members of this Court, the most effective response is no response at all.

In the present case, however, Merrill Lynch has interspersed in its ad hominem ramblings statements of "fact" which are untrue. Petitioners, therefore, have the distasteful necessity, in Point III, to respond to several of Merrill Lynch's prevarications point by point.

POINT I

CONTRARY TO MERRILL'S CONTENTION, THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUIT COURTS OF APPEALS AND STATE COURTS AS TO WHETHER ARBITRATORS SHOULD DECIDE PRECLUSION ISSUES.

Eleven pages of the Petition for Certiorari, 16 through 26, are devoted to demonstrating that federal Circuit Courts of Appeals and state courts are sharply divided on the issue of who should decide preclusion

issues---courts or arbitrators---when the parties have agreed to submit all of their disputes to arbitration. Of the cases discussed, four held that courts should decide, three held that arbitrators should decide, and one went both ways, holding that courts should rule on the preclusion effect of judgments and arbitrators should rule on preclusion effect of awards.

The Alabama Supreme Court, in its opinion in this case, devotes four and one half pages to a discussion of the conflicting decisions of the federal and state courts. (Appendix C-12 through C-16) The Alabama Supreme Court declared:"The issue has been addressed in other jurisdictions, and those courts have reached divergent conclusions." (Appendix C-12)

Nevertheless, Merrill Lynch insists in Point I of its Argument: "Under the facts of this case, there is no dispute among courts." Merrill Lynch does not explain away the obvious disagreement among the courts, much less, how the facts of this case could possibly resolve the disputes among the courts on questions of law.

In its attempt to show that there is no conflict in the Circuit Courts of Appeals Merrill Lynch seeks to explain away the holdings of three decisions (discussed at pages 22 through 27 of the Petition) which hold most strongly that arbitrators are to decide preclusion issues when the parties have agreed to arbitrate all their disputes. Merrill Lynch seeks to reconcile those decisions by proposing that, regardless of what the courts may have said, they and the Alabama Supreme Court in this case were really applying a simplistic rule: Arbitrators

should decide the preclusion effect of arbitration awards and courts should decide the preclusion effect of judgments. Even if the decisions could be so construed, it would be impossible to reconcile such a rule with an agreement to submit *all* disputes to arbitration.

In addition to attempting to explain away the three cases cited by Petitioner, Merrill Lynch "distinguishes" by the same rationale *Consolidated Coal Co v. United Mine Workers*, 213 F.3d 404 (7th Cir. 2000), a case petitioners did not cite. The seventh circuit held that when different arbitrators under a single union contract render inconsistent decisions, courts must not attempt to resolve the conflict but must confirm both awards, leaving to subsequent arbitration the question of which award to follow. That ruling certainly does not support Merrill Lynch's contention that preclusion issues are too recondite for arbitrators and should be ruled on by judges, regardless of what the parties agreed.

In any event, contrary to Merrill Lynch's contention, this Court recognized that a conflict among the lower courts does exist when it granted certiorari in *Howsam.*

POINT II
PETITIONERS PRESERVED IN THE ALABAMA COURTS THE ARGUMENTS THEY MAKE HERE.

Merrill Lynch reasserts an argument it made without success in the Alabama Supreme Court: It is impermissible to cite on appeal any authority which had not been cited in the trial court. In particular, Merrill

Lynch argued that the Alabama Supreme Court should not give any cognizance to *National Fire Insurance Company of Pittsburgh v. Belco Petroleum Corp.*, 88 F.3d 129(2d Cir.1996), because the Petitioners cited it for the first time on their motion for a new trial in the circuit court. Petitioners pointed out that it is universal for lawyers to do much more extensive research on an appeal than they usually have time for at the trial level. The Alabama Supreme Court in its opinion discussed not only the Belco case but ten others which had not been cited in the trial court. (Appendix C)

POINT III
MERRILL LYNCH'S IRRELEVANT AD HOMINEM ATTACK AND ITS DISPARAGING ALLEGATIONS HAVE NO SUPPORT IN THE RECORD.

Merrill Lynch, in its Brief In Opposition to the Petition for Certiorari, has applied the adage "if you are weak on the law, argue the facts." Unfortunately for Merrill Lynch, it is equally weak on the facts. Its solution: Invent better facts.

A. The Truth As To "Four" Previous Petitions for Certiorari

None of Merrill Lynch's ad hominem aspersions relates to litigation in which Merrill Lynch itself was a party. It has no complaint concerning Baker's conduct either in the Florida arbitration or in either of the Alabama courts.

Baker, it is true, did file two petitions for

certiorari in the *Bennett* litigation, in the case the Alabama Supreme Court refers to as Alabama-Baker I. The first Petition was directly from that decision. The second, as is set forth more fully below, was from a Florida decision on a Fourteenth Amendment jurisdiction issue. Merrill Lynch was not involved in either of those two cases. What is truly significant about Alabama-Baker I is that six years later the Alabama Supreme Court *sua sponte* overruled its decision against Baker (Pet. p. 10). In short, Merrill Lynch's implication that Baker has been showering this Court with petitions for certiorari is untrue. In any event, no rule of law is better settled than that denial of certiorari is not a decision on the merits or a precedent.

B. The Truth As To The Madison County Litigation

Merrill Lynch devotes two and one half pages of its brief to a purported description of "The Madison County Litigation" (Alabama-Baker I). Nowhere does Merrill Lynch disclose that the Alabama Supreme Court overruled its decision against Baker in that case six years later in *State Farm Fire & Cas. Co. v. Owen*, 729 So. 2d 834 (Ala. 1998). Moreover, as is set forth below, Merrill Lynch's statement of the facts in that case runs the gamut from misleading to outright falsehood. More important, Merrill Lynch's entire recital, even if it were true, would have no relevance to a decision concerning granting certiorari to decide the important arbitration issue presented by this case.

The Bennett litigation arose out of a computer leasing transaction more than 20 years ago between

parties completely unrelated either to the present litigation or to the three lawsuits against Baker in Alabama. Those unrelated persons were Gibbs and West, the owners of a coal mine in Alabama, and Atlantic Computer Leasing Ltd., an English computer leasing company("Atlantic"). Baker was the attorney for Atlantic.

The facts and proceedings in the Bennett litigation are set forth at pages 7 through 14 of the Petition for Certiorari. Merrill Lynch does not contest the accuracy of that description. Nevertheless, Merrill Lynch in its Brief In Opposition, commencing at page 3, sets forth the allegations of the Bennetts' *complaint* as if these were the facts found by the Alabama courts. In fact, the Alabama Supreme Court did not hold that there was any evidence of misrepresentation by Baker or any intentional omission to disclose facts.

The Alabama Supreme Court held that the jury could have found Baker liable, at most, for innocent nondisclosure. Six years later, in *State Farm Fire & Cas. Co. v. Owen*, *supra*, the Alabama Supreme Court overruled that decision. Baker did not learn of this, however, until it was too late to reverse the judgment.

It is true that Baker unsuccessfully resisted enforcement of the Bennetts' judgment in his home state of Florida on the ground that the Alabama courts never had obtained personal jurisdiction over him. Alabama claimed jurisdiction by virtue of two long distance telephone calls to New York which the accountants for Bennetts had made *to him* and a return telephone call

Baker made to the accountants informing them that his English client, Atlantic Leasing Company Ltd., had consented to the transfer from Gibbs and West to Bennett.

It is true, as Merrill Lynch alleges, that Baker sought certiorari from this Court on the jurisdiction issue, which was denied. Nevertheless, Baker's due process objection clearly was far from frivolous.

It is not true, as Merrill Lynch alleges, that "a Florida appeals court sanctioned Baker for taxing judicial resources with his frivolous filings." What actually occurred is that Baker's Florida counsel mistakenly filed a reply brief in support of a petition for certiorari from the Florida Supreme Court. This is not authorized by the Florida Supreme Court rules. The Court imposed a fine of $100. Merrill Lynch's allegation may not be an outright lie, but it certainly is a gross exaggeration.

Merrill Lynch declares that Baker owned the leasing company and received $1.3 million from the Bennetts. Both of these allegations are absolutely false.. Baker had no ownership at all in Atlantic Computer Leasing Ltd. Bennett made his purchase from Gibbs and West, not from Atlantic, much less Baker. Of the $1.3 million which Gibbs and West paid, $1.25 million was paid to the manufacturer of the computer, IBM. Atlantic made a modest profit on the sale to Gibbs and West and Baker received a legal feefrom his client. The Bennetts did not deal with Baker and paid Baker nothing.

Finally, Merrill Lynch completes its discussion of

"The Madison County Litigation"with a truly offensive and unprofessional accusation: "Baker is a wealthy man. . . It would not have been unduly difficult for him to pay the $440,025 Madison County judgment."

By the same standard, Merrill Lynch is an extraordinarily rich corporation, with billions of dollars in assets. It would not be "unduly difficult " for Merrill Lynch to reimburse Leon C. Baker P.C. for the $723,353 which was taken from its account by virtue of Merrill Lynch's initial negligence and its subsequent complicity.

These two foregoing arguments are absurd and improper. The difference between them is that Merrill Lynch has used its version in an obvious effort to prejudice the Court against Baker. Petitioners have responded only to show the ridiculous lengths to which Merrill Lynch has gone in its efforts to find some ground for denying the Petition for Certiorari.

Merrill Lynch next purports to summarize "The Jefferson County Litigation" but neglects entirely, even to mention, the negligence of Merrill Lynch in submitting as an account statement of Baker a statement of Leon C. Baker P.C. with the "P.C." omitted. That omission is a fundamental undisputed fact. Merrill Lynch's failure even to mention the omission in its purported summary is consistent with its general lack of candor with respect to the facts.

Merrill Lynch proceeds to argue the merits of whether the judgment in the Jefferson County Court has any collateral estoppel effect, ignoring the principal issue

in this case, namely, whether the preclusion issue is one of those which Merrill Lynch and the P.C. agreed that the arbitrators should decide when they contracted to submit "all" their disputes to arbitration.

Merrill Lynch ends its purported description of the Jefferson County proceedings with an outright falsehood. It declares: "The Alabama Supreme Court, however, affirmed the circuit court's order *in its entirety*, without opinion. (Emphasis added.) The truth is that the P.C. could not appeal, and did not even attempt to, because it was not a party to the Jefferson County action (Alabama-Baker III). Under Alabama law only parties can appeal. Baker was a party, but he could not appeal from the order directing Merrill Lynch to pay $723,353 to the Bennetts. The funds were seized from the P.C.'s account, not his.

Baker only appealed, from an order fining him for not appearing. He alleged, as grounds for setting aside the fine, among others, (1) that the Jefferson County Circuit Court had no personal jurisdiction over him, (2) that no summons or other process had been served on him, 3) that his victory in Alabama-Baker II was res judicata and barred the Jefferson County action, and 4) that the Circuit Court erred in fining him $90,000, far in excess of the statutory limit. The truth belies Merrill Lynch's assertion that Baker-Alabama IV is res judicata with respect to any issues relevant to the Petition.

CONCLUSION

This Court should grant the Petition for Certiorari.

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